16-95

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No 612.

HENRY C. BROWN, PLAINTIFF IN ERROR,

vs.

THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

FILED OCTOBER 6, 1882.

SUPREME COURT OF THE UNITED STATES.

No. 612.

HENRY C. BROWN, PLAINTIFF IN ERROR,

vs.

THE STATE OF COLORADO.

IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

INDEX.

	Original.	Print.
Citation for writ of error	1	1
Writ of error	3	1
Citation	4	2
Return to writ	6	3
PROCEEDINGS IN DISTRICT COURT.		
Caption	7	4
Demurrer argued and sustained, and leave granted to amend complaint	9	4
Demurrer to amend complaint argued, and leave granted to answer	10	5
Cause set for trial	10	5
Trial and findings	11	6
Notice of motion for new trial	12	6
Motion for new trial withdrawn	13	6
Judgment	13	7
Motion for new trial granted	15	7
Cause set for trial, &c	16	8
Trial and judgment	17	8
Motion for new trial granted	18	8
Leave granted to withdraw opinion	19	9
Change of venue	20	9
Clerk's certificate	20	10
Summons	21	10
Complaint	23	11
Demurrer	25	12
Amended complaint	26	12
Demurrer to amended complaint	29	14
Answer to amended complaint	30	14
Bill of exceptions	31	15
Motion for new trial	32	15
Cause set for trial	33	16
Trial	33	16

	Original.	Print.
Finding and judgment	34	16
Appeal to supreme court	36	17
Appeal bond	36	17
Bill of exceptions	38	18
Clerk's certificate	48	23

PROCEEDINGS IN SUPREME COURT.

Assignment of errors	49	23
Cause set for hearing	51	24
Joinder in error	53	25
Cause set for hearing	54	25
Cause argued and submitted	55	26
Opinion	56	26
Judgment	71	33
Bond	72	33
Assignment of errors	73	34
Bill of exceptions	77	36
Præcipe for record	88	42
Clerk's certificate	89	43
Joinder in error	90	43

1 STATE OF COLORADO,
Supreme Court, ss:

STATE OF COLORADO, APPELLEE,
vs.
HENRY C. BROWN, APPELLANT. } No. 734.

Error to the district court of Jefferson County.

To the Hon. Samuel H. Elbert, chief justice of said supreme court:

Now comes Henry C. Brown, the above-named appellant, by James H. Brown, his attorney, and complains that in the record and proceedings, and also in the rendition of a judgment in a suit between Henry C. Brown, appellant, and the State of Colorado, appellee, in the supreme court of the State of Colorado, being the highest court of law of the said State in which a decision could be had in said suit, and in which a final judgment was rendered against him on the twenty-second (22nd) day of April, A. D. 1881, in said suit, wherein was drawn in question the validity of sections two (2), three (3), and four of article eight (viii), and section three (3) of the schedule of the constitution of the State of Colorado, on the ground
2 of their being repugnant to the Constitution of the United States, especially paragraph one (1), section ten (10), of article one (i) thereof, and the decision was in favor of such their validity, all which appears in the record and proceedings in said suit, manifest error hath happened, to the great damage of the said Henry C. Brown.

Wherefore he prays for the allowance of a writ of error, and such other process as may cause the same to be corrected by the Supreme Court of the United States.

JAMES H. BROWN,
Att'y for Petitioner, Henry C. Brown.

Allowed this 30th day of August, A. D. 1881, as of the 13th of May, 1881.

S. H. ELBERT,
Chief Justice of the Supreme Court of the State of Colorado.

(Indorsed:) 734. A. In supreme court. State of Colorado, appellee, vs. Henry C. Brown, appellant. Petition for allowance of writ of error. Jas. H. Brown, pet's att'y.

3 *Writ of error to supreme court, State of Colorado.*

THE UNITED STATES OF AMERICA.

[Eagle.]

UNITED STATES OF AMERICA,
State of Colorado, ss:

The President of the United States to the judges of the supreme court of the State of Colorado, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some

of you, being the highest court of the said State in which a decision could be had in the said suit between the State of Colorado and Henry C. Brown, wherein was drawn in question the validity of an act by the Senate and House of Representatives of the United States in Congress assembled, entitled "An act to provide a temporary government for the Territory of Colorado," approved February 28th, A. D. 1861, and an act by the council and house of representatives of the Territory of Colorado, entitled "An act to locate the seat of government of the Territory of Colorado," approved December 9th, A. D. 1869, and also sections two (2), three (3), and four (4) of article eight (viii), and section three (3) of the schedule of the constitution of the said State of Colorado, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said Henry C. Brown, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second (2nd) Monday of October next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 13 day of May, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the 105 year.

[SEAL.] EDWARD F. BISHOP, *Clerk.*

Allowed by—

Judge.

(Indorsed:) C. Gen. No. . Supreme court of the State of Colorado. Henry C. Brown, plaintiff, vs. State of Colorado. Writ of error to supreme court, State of Colorado.

4 *Citation.—Supreme court, State of Colorado.*

THE UNITED STATES OF AMERICA,
State of Colorado:

The United States of America to the State of Colorado, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second (2nd) Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein Henry C. Brown is plaintiff in error and the said State of Colorado is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel H. Elbert, chief justice of the supreme court of the State of Colorado, this 13th day of May, in the year of our Lord one thousand eight hundred and eighty-one.

S. H. ELBERT,
Chief Justice of the Supreme Court of the State of Colorado.

5 *Proof of service.*

THE UNITED STATES OF AMERICA,
State of Colorado, ss:

On this 13th day of May, A. D. 1881, personally appeared James H. Brown before me, the subscriber, a clerk of the supreme court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to Frederick W. Pitkin, governor of and for the within-named defendant in error, the State of Colorado, and also delivered a true copy of the within citation to Charles H. Toll, attorney-general of and for the within-named defendant in error, the State of Colorado, on the 13th day of May, A. D. 1881.

JAMES H. BROWN.

Sworn to and subscribed before me this 13th day of May, A. D. 1881.

KEYES DANFORTH,
Clerk Supreme Court of Colorado.

A copy of the within citation was served on me this 13th day of May, A. D. 1881.

FREDERICK W. PITKIN,
Governor.

DENVER, COLORADO, *May* 13, 1881.

A copy of the foregoing citation was served on me this 13th day of May, A. D. 1881.

CHARLES H. TOLL,
Att'y Gen'l.

(Indorsed:) D. Gen. No. . Supreme court of the State of Colorado. Henry C. Brown, plaintiff in error, vs. State of Colorado, defendant in error. Citation. Filed in court of the , this day of , A. D. 18 .

6 The answer of the honorable Samuel H. Elbert, chief justice of the supreme court of the State of Colorado, to the foregoing writ.

The record and process whereof mention is therein made, follow in these words, to wit:

Supreme court, State of Colorado.

Pleas before the honorable supreme court of the State of Colorado, at the April term, A. D. 1881, thereof, at the court-room, in the city of Denver, in the year of our Lord one thousand eight hundred and eighty-one. Present, honorable Samuel H. Elbert, chief justice; honorable Wilbur F. Stone, associate justice; honorable William E. Beck, associate justice; Michael Spangler, sheriff of Arapahoe County, by James A. Miller, bailiff of said court; Keyes Danforth, clerk.

7 UNITED STATES OF AMERICA,
State of Colorado, Jefferson County, ss:

In district court, April term, A. D. 1880.

Pleas before the honorable Thomas Mitchell, judge of the district court of the first judicial district of the State of Colorado, and sole presiding judge of the district court of Jefferson County, in the State aforesaid, and at a term thereof begun and held at the court-house in the city of Golden, in said county, on the second Tuesday (being the thirteenth day) of April, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and .

Present, honorable Thomas Mitchell, judge of the first judicial district of the State of Colorado; H. M. Orahood, esq., district attorney; J. M. Johnson, jr., esq., sheriff.

Attest:

W. A. DIER, *Clerk.*

Be it remembered that heretofore, and, on, to wit, the 13th day of
8 April, A. D. 1880, the same being one of the judicial days of said April term, came Sam. E. Browne, esq., of counsel for the defendant in the cause hereinafter mentioned, and filed in said court the transcript in said cause on change of venue from Arapahoe County to Jefferson County, which transcript is in words and figures as follows, to wit:

District court, Arapahoe County.

STATE OF COLORADO,
County of Arapahoe, ss:

Pleas in the district court of the second judicial district of the State of Colorado, sitting in and for the county of Arapahoe, before the honorable Victor A. Elliott, judge of said judicial district, at a term thereof begun and held at the court-house in Denver, in said county, on the third Tuesday (it being the fifteenth day) of April, A. D. one thousand eight hundred and seventy-nine.

Present, honorable Victor A. Elliott, judge of the district court of the second judicial district of the State of Colorado; David B. Graham, esq., district attorney of said district; David J. Cook, esq., sheriff of said county; Archie C. Fisk, esq., clerk of said court.

STATE OF COLORADO
v. } Ejectment.
HENRY C. BROWN.

9 Be it remembered that heretofore, and on the 5th day of June,

A. D. 1879, the same being one of the regular judicial days of the April term, A. D. 1879, the following proceedings inter alia were had and entered of record in said cause, to wit:

STATE OF COLORADO
v.
HENRY C. BROWN. } 4396. Ejectment.

At this day comes the said plaintiff, by C. W. Wright, esq., its attorney, and the said defendant, by Samuel E. Browne, his attorney, also comes; and the demurrer of the said defendant to the complaint herein of the said plaintiff coming on now to be heard, is argued by counsel; and the court being now sufficiently advised in the premises, it seemeth to the court here that said complaint, and the matters and things therein contained, are not sufficient for the said defendant to answer unto; and thereupon the court doth sustain said demurrer.

And thereupon, on motion of said plaintiff, time, and until ten days, is given said plaintiff in which to amend its said complaint.

And afterwards, and on, to wit, the 3rd day of September, A. D. 1879, the same being one of the regular judicial days of the September term, A. D. 1879, the following proceedings, inter alia, were had and entered of record in said cause, to wit:

STATE OF COLORADO
v.
HENRY C. BROWN. } 4396. Ejectment.

10 At this day comes the said plaintiff, by Charles W. Wright, esq., its attorney, and the said defendant, by Samuel E. Browne, esq., his attorney, also comes.

And this cause coming on now to be heard upon the demurrer of the said defendant to the amended complaint of the plaintiff herein, is argued by counsel; and the court being now sufficiently advised in the premises, it seemeth to the court here that the said amended complaint is sufficient in law for the said defendant to answer unto. Nevertheless, leave is granted to the said defendant to answer the said amended complaint by the incoming of the court on Monday, the 8th day of September, instant, as he shall be advised.

And afterwards, and on, to wit, the 4th day of September, A. D. 1879, the same being one of the regular judicial days of the September term, A. D. 1879, of said court, the following further proceedings were had and entered of record in said cause, to wit:

STATE OF COLORADO
v.
HENRY C. BROWN. } 4396. Ejectment.

At this day comes the said plaintiff, by Charles W. Wright, esq., its attorney, and the said defendant, by Samuel E. Browne, esq., his attorney, also comes; and thereupon, both parties consenting thereto,

it is ordered by the court that this cause be set for trial on Tuesday, the 14th day of October, proximo.

And afterwards, and on, to wit, the 15th day of October, A. D. 1879, the same being one of the regular judicial days of the September term, A. D. 1879, of said court, the following proceedings were had and entered of record in said cause, to wit:

STATE OF COLORADO
v. } 4396. Ejectment.
HENRY C. BROWN.

At this day comes the plaintiff by Charles W. Wright, attorney-general, and the defendant by Samuel E. Browne, esq., his attorney, also comes; and thereupon, both parties consenting thereto, this cause comes on for trial before the court without a jury. And the court having heard the evidence upon the part of the plaintiff, the defendant doth move the court for judgment as of nonsuit, which motion is argued by counsel, and the court being advised in the premises doth deny said motion.

And the court having heard the evidence as well on the part of the defendant as on the part of the plaintiff, and the argument of counsel, doth find the issues herein joined for the plaintiff, and that the plaintiff
12 was and is the owner in fee of the premises specified in the plaintiff's complaint herein, and was and is entitled to the immediate and exclusive possession thereof as claimed in said complaint.

And the court doth further find that the defendant was and is guilty of unlawfully intruding upon and withholding from the plaintiff the premises described in its complaint in this cause, and the court doth assess the plaintiff's damages by occasion thereof at the sum of one cent.

And afterwards, and on, to wit, the 18th day of October, A. D. 1879, the same being one of the regular judicial days of the September term, A. D. 1879, of said court, the following proceedings, inter alia, were had and entered of record in said cause, to wit:

STATE OF COLORADO
v. } 4396. Ejectment.
HENRY C. BROWN.

At this day comes the said plaintiff by Charles W. Wright, esq., attorney-general, and the said defendant by Samuel E. Browne, esq., his attorney, also comes; and thereupon the said defendant doth give notice to the court that he will move for a new trial in this behalf.

Whereupon it is ordered by the court that said motion be filed
13 herein by the incoming of the court on Tuesday, the 21st day of October instant.

And afterwards, and on, to wit, the 20th day of October, A. D. 1879, the same being one of the regular judicial days of the September term of said court, the following further proceedings were had and entered of record in said cause, to wit:

STATE OF COLORADO
v. } 4396. Ejectment.
HENRY C. BROWN.

At this day comes the said plaintiff by Charles W. Wright, esq., attorney-

general, and the said defendant by Samuel E. Browne, esq., his attorney, also comes; and thereupon the said defendant, by leave of court, withdraws the notice heretofore given by him of a motion for a new trial in this behalf.

And the court, by whom the issue joined by this cause was tried, a jury herein having been expressly waived by consent of both parties, having found that the said defendant is guilty of unlawfully intruding upon and withholding from the plaintiff the premises described in its complaint in this cause, as follows, to wit:

"That certain tract of land situated in the county of Arapahoe and State of Colorado described as follows: Commencing at the south-
14 east corner of the Congressional grant made by the United States to the city of Denver, in said county, to wit, the southeast corner of the west half of section thirty-four (34) in township three (3) south, of range sixty-eight (68) west, and running thence east on the south line of said section thirty-four (34) four hundred and twenty-four (424) feet; thence south at right angles with the south line of said section sixty (60) feet, which last point is the place of beginning of the description of the parcel of land seized in fee by the plaintiff aforesaid, the same commencing at said last point sixty (60) feet south of the south line of said section and running thence south six hundred (600) feet; thence east parallel with the south line of said section seven hundred and twenty-six (726) feet; thence north at right angles six hundred (600) feet; and thence west to the place of beginning, seven hundred and twenty-six (726) feet, containing ten (10) acres, the same being and situate in the northwest quarter of the northeast quarter of section three (3), in township four (4) south, of range sixty-eight (68) west," and that the plaintiff was and is the owner of the same in fee, and is entitled to the immediate and exclusive possession thereof; and having assessed the damages of the plaintiff by reason thereof over and above its costs and charges by it about its suit in this behalf expended at
15 the sum of one cent: Therefore it is considered by the court that the plaintiff do recover against the defendant, Henry C. Brown, the possession of the premises according to the finding of the court aforesaid, and that it have a writ of possession therefor according to the force, form, and effect of its said recovery. And it is further considered by the court that the plaintiff do recover of and from the said defendant its damages by the court in form aforesaid assessed, together with its costs in this behalf expended, to be taxed and have execution therefor.

And afterwards, and on, to wit, the 22nd day of October, A. D. 1879, the same being one of the regular judicial days of the September term, A. D. 1879, of said court, the following further proceedings were had and entered of record in said cause, to wit:

STATE OF COLORADO)
vs.) 4396. Ejectment.
HENRY C. BROWN.)

At this day comes the said defendant, by Samuel E. Browne, esq., his attorney, and it appearing to the court that all the costs in this action have been fully paid by said defendant:

It is ordered by the court that the order heretofore and on the 20th day of October, instant, made and entered of record herein be vacated

16 and for naught held, and that the motion of the said defendant for a new trial in this behalf be granted in accordance with the provision of the statute.

And afterwards, and on, to wit, the 8th day of December, A. D. 1879, the same being one of the regular judicial days of the special December term, A. D. 1879, of said court, the following proceedings, inter alia, were had and entered of record in said cause, to wit:

STATE OF COLORADO
v.
HENRY C. BROWN. } 4396. Ejectment.

At this day comes the said plaintiff, by H. H. King, esq., its attorney, and the said defendant, by T. G. Putnam, esq., his attorney, also comes; and thereupon on motion of said plaintiff, it is ordered by the court that this cause be set for trial on Thursday, the 15th day of January proximo.

And afterwards, and on, to wit, the 7th day of January, A. D. 1880, the same being one of the regular judicial days of the January term, A. D. 1880, of said court, the following proceedings, inter alia, were had and entered of record in said cause, to wit:

STATE OF COLORADO
v.
HENRY C. BROWN. } 4396. Ejectment.

17 At this day comes the said plaintiff, by Charles W. Wright, attorney-general, and the said defendant, by Samuel E. Brown, esq., his attorney, also comes; and thereupon, both parties thereto consenting: It is ordered by the court that this cause be set for trial, without a jury, on Monday, the 23rd day of February proximo, and that the Hon. Thomas M. Bowen, judge of the fourth judicial district of the State of Colorado, be requested to preside in this court upon said trial.

And afterwards, and on, to wit, the 21st day of February, A. D. 1880, the same being one of the regular judicial days of the January term, A. D. 1880, of said court, the following further proceedings, inter, alia were had and entered of record in said cause, to wit:

STATE OF COLORADO
v.
HENRY C. BROWN. } 4396. Ejectment.

At this day comes the said plaintiff, by Hon. Charles W. Wright, attorney-general, and the said defendent, by Samuel E. Browne, esq., and J. A. Brown, esq., his attorney, also comes.

And comes also honorable Thomas M. Bowen, judge of the fourth judicial district of the State of Colorado, presiding in this behalf, in pursuance of the former order of this court; and thereupon, both parties consenting
18 thereto, the court proceeds to trial of this cause without a jury. And the court having heard the evidence produced herein on behalf of

the plaintiff, the said defendant doth move the court for judgment herein, as in case of nonsuit. And the court being now sufficiently advised in the premises doth grant said motion. Whereupon it is considered by the court that the said defendant go hence hereof without day, and have and recover of and from the said plaintiff his costs by him in this behalf laid out and expended, to be taxed. And thereupon the said plaintiff doth give notice to the court that it will move for a new trial in this behalf.

And afterwards, and on, to wit, the 15th day of March, A. D. 1880, the same being one of the regular judicial days of the special March term, A. D. 1880, of said court, the following proceedings were had and entered of record in said cause, to wit:

STATE OF COLORADO
v. } 4396. Ejectment.
HENRY C. BROWN.

At this day comes the said plaintiff, by Hon. Charles W. Wright, attorney-general, and said defendant, by T. G. Putnam, esq., and J. H. Brown, esq., his attorney, also comes. And thereupon this cause,
19 coming on to be heard upon the motion of the said plaintiff for a new trial in this behalf, is argued by counsel. And the court being now sufficiently advised in the premises doth grant said motion.

And afterwards, and on, to wit, the same day, the following further proceedings were had and entered of record in said cause, to wit:

STATE OF COLORADO
v. } 4396. Ejectment.
HENRY C. BROWN.

At this day comes the said defendant, by J. H. Brown, esq., his attorney, and thereupon, on his motion, it is ordered by the court that the said J. H. Brown have leave to withdraw the opinion heretofore filed herein by the court in reference to the motion made by said plaintiff for a new trial, from the files, and retain the same in his custody for the space of one week from this day.

And afterwards, and on, to wit, the 3rd day of April, A. D. 1880, the same being one of the regular judicial days of the special March term, A. D. 1880, of said court, the following proceedings, inter alia, were had and entered of record in said cause, to wit:

20 STATE OF COLORADO
v. } 4396. Ejectment.
HENRY C. BROWN.

At this day comes the said plaintiff, by H. H. King, esq., its attorney, and the said defendant, by S. E. Browne, esq., his attorney, also comes.

And, it appearing to the court that this cause has heretofore been assigned by counsel for trial before the honorable Thomas M. Bowen, judge of the fourth judicial district, on account of some supposed local interest

influencing the judge of this court, and the judge of this court being now unwilling to preside at the new trial of this cause, and not being able to secure the judge of another district to try said cause in this court within a reasonable time, it is therefore ordered that the venue of this cause be changed to Jefferson County.

STATE OF COLORADO,
County of Arapahoe, ss:

I, Archie C. Fisk, clerk of the district court of Arapahoe County, State aforesaid, do hereby certify the above and foregoing to be a true, complete, and perfect transcript and copy of all orders of court had in entered of record in a certain cause in said court lately depending, wherein the State of Colorado was plaintiff and Henry C. Brown was defendant,
21 and that the papers marked A, B, C, D, E, F, G, & H constitute the original pleadings, and that the papers marked I, K, L, M, N, O, P, & Q are the original exhibits, and sundry other papers also filed in the same, the same making all the pleadings and papers heretofore filed in this court.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at the court-house, in the city of Denver, county and State aforesaid, this 12th day of April, A. D. 1880.

[DISTRICT COURT SEAL.] ARCHIE C. FISK, *Clk*,
By HENRY SPARWICK, *D'p'y*.

Summons.

STATE OF COLORADO,
County of Arapahoe, ss:

In the district court of the second judicial district of the State of Colorado, in and for the county of Arapahoe.

STATE OF COLORADO, PLAINTIFF,)
v.) Summons.
HENRY C. BROWN, DEFENDANT.)

The people of the State of Colorado send greeting to the said defendant above named:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the district court of the second judicial district of the State of Colorado, in and for the county of Arapahoe,
22 and to answer the complaint filed therein within ten days, exclusive of the day of service if served within this county, or if served out of the county but in this district, within twenty days, otherwise within forty days, or judgment by default will be taken against you according to the prayer of the complaint. The said action is brought to recover possession of the premises described as follows: Commencing at a point 60 feet south of the south line of section 34, township 3 south, range 68 west, and running thence south six hundred (600) feet; thence east parallel with the south line of said section 726 feet; thence north at right angles 600 feet; thence west to the place of beginning, 726 feet, containing ten (10) acres; the same being and situate in the northwest

quarter of the northeast quarter of section three (3), in township four (4) south, range 68 west; and also to recover the sum of one hundred dollars damages and costs of said suit, as will more fully appear by the complaint on file herein, to which reference is here made. And you are hereby notified that if you fail to appear and answer to the said complaint, as above required, the said plaintiff will apply to the court for the relief demanded in the complaint.

Given under my hand and the seal of the district court of the second judicial district of the State of Colorado, in and for the county of Arapahoe, this 12th day of May, A. D. 1879.

[SEAL.] ARCHIE C. FISK, *Clk.*

23 Endorsed as follows:

STATE OF COLORADO,
County of Arapahoe, ss:

I do hereby certify that I have duly executed the within summons on this twelfth (12) day of May, A. D. 1879, by delivering a true copy of the within to the within-named defendant, Henry C. Brown.

D. J. COOK, *Sheriff*,
By WM. WISE, *Dep'ty.*

Also, filed this 13th day of May, A. D. 1879. Archie C. Fisk, clerk. C. W. Wright, attorney-general, attorney for plaintiff.

Also, marked "A."

Complaint.

STATE OF COLORADO,
County of Arapahoe, ss:

In the district court of said county.

STATE OF COLORADO, PLAINTIFF,)
v.
HENRY C. BROWN, DEFENDANT.)

The plaintiff complains and alleges that on the eleventh day of January, A. D. 1878, it was seized in fee of that certain tract of land, situate in the county of Arapahoe and State of Colorado, described as follows:

Commencing at the southeast corner of the Congressional grant made by the United States to the city of Denver, in said county, to wit:

24 The southeast corner of the west half of section thirty-four (34), in township three (3) south, of range sixty-eight (68) west, and running thence east on the south line of said section thirty-four (34) four hundred and twenty-four (424) feet; thence south, at right angles with the south line of said section, sixty (60) feet, which last point is the place of beginning of the description of the parcel of land seized in fee by the plaintiff aforesaid, the same commencing at said last point sixty (60) feet south of the south line of said section, and running thence south six hundred (600) feet; thence east parallel with the south line of said section seven hundred and twenty-six feet (726) *feet*; thence north, at right angles, six hundred (600) feet, and thence west to the place of beginning seven hundred and twenty-six (726) feet, containing ten (10) acres, the same being and

situate in the northwest quarter of the northeast quarter of section three (3), in township (4) south, of range sixty-eight (68) west.

That while the plaintiff was so seized the defendant afterwards, and on the ninth day of May, A. D. 1879, entered into possession of the demanded premises, and now unlawfully withholds the possession thereof from the plaintiff, to its damage in the sum of one hundred dollars; wherefore the plaintiff prays judgment against the defendant:

First. For the recovery of the possession of the said demanded premises.

Second. For costs of suit.

25 C. W. WRIGHT,
Attorney-General.

(Endorsed:) Filed May 12th, 1879. Archie C. Fisk, clerk. Marked "B."

Demurrer.

STATE OF COLORADO,
Arapahoe County, ss:

In the district court.

STATE OF COLORADO, PLAINTIFF,
v.
HENRY C. BROWN, DEFENDANT.

The defendant demurs to plaintiff's complaint:

1st. Because the plaintiff has no legal capacity to sue; all suits in behalf of the State must be instituted & prosecuted in the name of "The people of the State of Colorado."

2ndly. Because the complaint does not state facts sufficient to constitute a cause of action in favor of plaintiff in this, that the action of ejectment, or the action under the code in the nature of an action of ejectment, does not lie in behalf of a sovereign State; that the complaint does not show the nature of plaintiff's title, or how, or for what purpose it was obtained, and that if the State was ever in possession of said land it could not be disseized by an individual.

BROWNE & PUTNAM,
Def't's Att'ys.

(Endorsed:) Filed May 15th, 1879. Archie C. Fisk, clerk.
26 Marked "C."

STATE OF COLORADO,
County of Arapahoe, ss:

In the district court of said county.

STATE OF COLORADO, PLAINTIFF,
v. } *ss.*
HENRY C. BROWN, DEFENDANT.

For an amended complaint, the plaintiff complains and says:

That on the eleventh day of January, A. D. 1879, it was seized in fee

of that certain tract of land situate and being in the county of Arapahoe, and State of Colorado, and more particularly described as follows:

Commencing at the southeast corner of the Congressional grant made by the United States to the city of Denver, in said county, to wit: The southeast corner of the west half of section thirty-four (34), in township three (3) south, of range sixty-eight (68) west, and running thence east on the south line of said section thirty-four (34) four hundred and twenty-four (424) feet; thence south at right angles with the south line of said section sixty (60) feet, which last point is the place of beginning of the description of the parcel of land seized in fee by the plaintiff aforesaid, the same commencing at said last point sixty (60) feet south of the south line of said section, and running thence south six hundred (600) feet; thence east and parallel with the south line of said section
27 seven hundred and twenty-six (726) feet; thence north at right angles six hundred (600) feet, and thence west to the place of beginning, seven hundred and twenty-six (726) feet, containing ten (10) acres, the same being and situate in the northwest quarter of the northeast quarter of section three (3), in township four (4) south, of range sixty-eight (68) west.

That while the plaintiff was so seized the defendant afterwards and about the ninth day of May, A. D. 1879, entered into the possession of the demanded premises described as aforesaid, and thereby, then and there, wrongfully ousted the plaintiff therefrom.

That by virtue of the premises, the plaintiff is entitled to the possession of said described property, and that the defendant wrongfully withholds the possession thereof from the plaintiff, to the plaintiff's damage in the sum of one hundred dollars.

And for other and further cause of action plaintiff complains and alleges:

That heretofore, to wit, on the first day of January, A. D. 1879, plaintiff was the owner in fee of certain real estate, the same being and situate in the county of Arapahoe and State of Colorado, and being particularly described as follows, to wit:

Commencing at the southeast corner of the Congressional grant made by the United States to the city of Denver, in said county, to wit:
28 The southeast corner of the west half of section thirty-four (34), in township three (3) south, of range sixty-eight (68) west, and running thence east on the south line of said section thirty-four (34) four hundred and twenty-four (424) feet; thence south at right angles with the south line of said section sixty (60) feet, which last point is the place of beginning, of the description of the parcel of land seized in fee by the plaintiff aforesaid, the same commencing at said last point sixty (60) feet south of the south line of said section, and running thence south six hundred (600) feet; thence east and parallel with the south line of said section seven hundred and twenty-six (726) feet; thence north at right angles six hundred (600) feet, and thence west to the place of beginning seven hundred and twenty-six feet (726), containing ten (10) acres, the same being and situate in the northwest quarter of the northeast quarter of section three (3), in township four (4) south, of range sixty-eight (68) west.

That on said day and from thence to the date hereinafter stated, plaintiff was in the sole possession of said described property.

That while the plaintiff was thus in the possession thereof, the defendant, on, to wit, the first day of May, A. D. 1879, wrongfully intruded and entered into and upon said described premises, and hitherto and still doth

continue his said intrusion and occupation, and wrongfully with-
29 holds the same from the plaintiff. That plaintiff is entitled to the possession of said premises; that the intrusion therein, and the occupation thereof by the defendant as aforesaid, is wrongful and without leave, and that the defendant still wrongfully withholds the same.

To the damage of the plaintiff in the sum of one hundred dollars.

Wherefore the plaintiff demands judgment:

(1). For the recovery of the possession of the said demanded premises.

(2). For one hundred dollars damages.

(3). For costs of suit.

C. W. WRIGHT,
Att'y-Gen'l.

(Endorsed:) Filed June 7, A. D. 1878. Archie C. Fisk, clerk, by Henry Sparnick, dep'ty. Marked "D."

STATE OF COLORADO,
Arapahoe County, ss:

In the district court.

THE STATE OF COLORADO, PLAINTIFF,
v.
HENRY C. BROWN, DEFENDANT.

The defendant demurs to the amended complaint, and for cause thereof, as to the first cause of action, shows to the court:

1st. That said plaintiff has no legal capacity to sue; the action should have been brought in the name of "The people of the State of Colo-
rado."

30 To cause, of action 1st and 2nd. That the plaintiff does not state facts sufficient to constitute a cause of action; in this, that the State cannot be designated as it is alleged in said complaint, and cannot maintain the action of ejectment, or the action provided for in chapter 24 of the code of civil procedure.

To the whole complaint that it is brought in the name of The State of Colorado instead of "The people," &c.

2nd. Because there is a misjoinder of causes of action, if one count is in ejectment, and the other for an intrusion into the possession of real estate the property of the State.

BROWN & PUTNAM,
Def'ts Att'ys.

(Endorsed:) Filed June 11, 1879. Archie C. Fisk, clerk, by Henry Sparnick, dep'ty. Marked "E."

STATE OF COLORADO,
Arapahoe County, ss:

In the district court.

THE STATE OF COLORADO, PLAINTIFF,
vs.
HENRY C. BROWN, DEFENDANT.

The defendant answers the amended complaint of the plaintiff and denies:

I. That the plaintiff is the owner or ever was the owner of the lands described in the complaint or any part thereof, or was ever seized or
31 possessed of the same or any part thereof, or entitled to the possession thereof, at any time or at all.

II. Denies that the plaintiff has any estate therein or ever had.

III. Denies that the said plaintiff has been damaged by said defendants withholding the said premises or the possession thereof in the sum of one hundred dollars or any other sum or at all.

BROWNE & PUTNAM,
Att'y for Def't.

(Endorsed:) Filed Sept. 4th, 1879. Archie C. Fisk, clerk. Marked "F."

STATE OF COLORADO,
Arapahoe County:

In district court.

THE STATE OF COLORADO, PLAINTIFF,
v.
HENRY C. BROWN, DEFENDANT.

Be it remembered that on the 15th day of March, A. D. 1880, the motion of the plaintiff for a new trial having been submitted at the next preceeding term of said court, the said motion was sustained and a new trial granted to the plaintiff in said cause, to which ruling of the court the defendant then and there excepted, and prays that this his bill of exceptions may be signed and sealed and made part of the record herein, which is done accordingly by the court.

VICTOR A. ELLIOTT, *Judge.* [SEAL.]

32 (Endorsed:) Filed March 17, 1880. Archie C. Fish, clerk. Marked "G."

STATE OF COLORADO,
County of Arapahoe, ss:

In the district court.

STATE OF COLORADO, PLAINTIFF,
against
HENRY C. BROWN, DEFENDANT.

Comes the plaintiff and moves the court for new trial of said cause, and to vacate the judgment entered herein, and for grounds of motion shows:

(1.) That plaintiff has paid all costs recovered by defendant on the verdict and judgment heretofore rendered herein against plaintiff as per certificate of clerk hereto attached.

(2.) The court erred in sustaining defendant's motion for a non suit.

C. W. WRIGHT,
Att'y Gen'l.

(Endorsed:) Marked "H." Also endorsed: Filed Feb'y 24, 1880. Archie C. Fish, clerk.

And which said transcript is endorsed as follows: Filed April 13, 1880. W. A. Dier, clerk.

Afterwards, and on, to wit, the 15th day of April, A. D. 1880, the same being one of said April term, A. D. 1880, the following proceed-
33 ings were had and entered of record in said court in said cause, to wit:

STATE OF COLORADO
v. } 755.
HENRY C. BROWN.

At this day it is ordered by the court, in accordance with the stipulation of counsel on file herein, that this cause come on for trial on Thursday next, the 22nd inst.

Afterwards, and on, to wit, the 24th day of April, A. D. 1880, the same being one of the judicial days of said April term, A. D. 1880, the following proceedings were had and entered of record in said cause, to wit:

STATE OF COLORADO
v. } 755. Ejectment.
HENRY C. BROWN.

And now on this day comes the said plaintiff by Charles W. Wright, attorney-general, and also comes the said defendant by S. E. Browne, esq., his attorney; and now this cause comes on for trial on the issues joined herein, and now by express agreement of counsel herein entered into here in open court, a trial by jury is waived, and this cause is now tried by the court without the intervention of a jury. And now the court hears all the evidence herein and the a'gument of counsel, and now this cause is taken under advisement by the court.

34 Afterwards, and on, to wit, the 26th day of April, 1880, the same being one of the judicial days of April term, the following proceedings were had and entered of record in said cause, to wit:

STATE OF COLORADO
vs. } 755. Ejectment.
HENRY C. BROWN.

And now on this day comes the said parties by their respective counsel; and now this cause, heretofore submitted to the court and by it taken under

advisement, comes on for a decision by the court on the issues joined herein; and now the court being fully advised in the premises find the issues joined in this cause for the plaintiff, and that it is the owner in fee-simple of the premises described in the complaint herein.

Whereupon it is ordered and adjudged by the court, in consideration of the premises and the finding aforesaid, that the said defendant is guilty of unlawfully withholding from the plaintiff the premises described in the complaint in this cause, to wit: "That certain tract of land situate in the county of Arapahoe and State of Colorado, described as follows: commencing at the southeast corner of the Congressional grant made by the United States to the city of Denver, in said county, to wit, the southeast corner of the west half of section thirty-four (34), in township
35 three (3) south, of range sixty-eight (68) west, and running thence east on the south line of said section thirty-four (34) four hundred and twenty-four (424) feet; thence south at right angles with the south line of said section sixty (60) feet, which last point is the place of beginning of the description of the parcel of land seized in fee by the plaintiff aforesaid, the same commencing at said last point sixty (60) feet south of the south line of said section and running thence south six hundred (600) feet; thence east parallel with the south line of said section seven hundred and twenty-six (726) feet; thence north at right angles six hundred (600) feet, and thence west to the place of beginning, seven hundred and twenty-six (726) feet, containing ten (10) acres, the same being and situate in the northwest quarter of the northeast quarter of section three (3), in township four (4) south, of range sixty-eight (68) west," and that the plaintiff is entitled to the immediate and exclusive possession thereof.

Therefore it is considered, ordered, and adjudged by the court, in consideration of the premises, that the plaintiff do recover against the defendant the possession of the said premises according to the finding of the court aforesaid, and that it have a writ of possession therefor according to the force, power, and effect of its said recovery. And it is further ordered by the court that the plaintiff have and recover of and from said defendant its costs herein expended, to be taxed, and have execution therefor.
36 And the defendant excepts to such finding and judgment of the court, and prays an appeal to the supreme court, which is granted by the court upon the condition that the defendant within thirty days from the adjournment of this court file his appeal bond herein in sum of two hundred dollars, with surety to be approved by the clerk of the court in vacation, and that within ninety days he present his bill of exceptions herein, to be allowed as of this term.

And afterwards, and on, to wit, the 13th day of May, A. D. 1880, the same being a day in vacation after the April term, A. D. 1880, of said court, came said defendant and filed in the office of the clerk of said court his bond on appeal in said cause, in words and figures, as follows, to wit:

Know all men by these presents that I, Henry C. Brown as principal, and John A. Lennon as surety, of the county of Arapahoe and State of Colorado, are held and firmly bound unto the State of Colorado in the penal sum of two hundred dollars, lawful money of the United States, for the payment of which well and truly to be made we do hereby bind our-

selves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 12th day of May, A. D. 1880.

The condition of the above obligation is such that whereas on the
37 26th day of April, A. D. 1880, in the district court of the county of Jefferson and State of Colorado, in a certain action then there pending, wherein the said State of Colorado was plaintiff and the said Henry C. Brown defendant, the said plaintiff recovered judgment for the recovery of the possession of ten (10) acres of land in the complaint particularly described and for the costs of said action, from which said judgment of said district court the said Henry C. Brown has prayed for and obtained an appeal to the supreme court of said State:

Now, therefore, if the said Henry C. Brown shall duly prosecute his said appeal, shall pay all damages which may be sustained by plaintiff by reason of said appeal, and shall obey and suffer said judgment to be carried into effect in case the same is affirmed by said supreme court, and shall pay all costs which accrued or which may accrue in said cause, and interest and damages, then this obligation to be void, otherwise to be and remain in full force and effect.

HENRY C. BROWN. [SEAL.]
JOHN A. LENNON. [SEAL.]

STATE OF COLORADO,
Arapahoe County, ss:

John A. Lennon being duly sworn, says that he is the owner of real estate situate in said county, in his own name and right, wholly unencumbered, of the value of more than five hundred dollars over and above all just debts and liabilities against him.

38 (Signed) JOHN A. LENNON.

Subscribed and sworn to before me this 12th day of May, A. D. 1880.

(DIST. CT SEAL) ARCHIE C. FISK,
(ARAPAHOE COUNTY, COL.) *Clk.*

Endorsed as follows, to wit:
Filed and approved by me, this May 13, 1880.

W. A. DIER,
Clerk.

Afterwards, and on, to wit, the 18th day of May, A. D. 1880, the same being a day in vacation after said April term, came the said defendant and filed in the office of the clerk of said court his bill of exceptions herein in words and figures as follows, to wit:

STATE OF COLORADO,
Jefferson County, ss:

In the district court.

THE STATE OF COLORADO, PLAINTIFF,
v.
HENRY C. BROWN, DEFENDANT.

Be it remembered that on the trial of said cause before said court, both parties having waived a jury, the plaintiff, to maintain the issues on its part offered, in evidence a deed, which was in the words and figures following, to wit:

39 EX. A.

Warranty deed.—Henry C. Brown to the Territory of Colorado. Filed for record January 11th, A. D. 1868, at 12½ o'clock p. m.

This deed, made this eleventh day of January, in the year of our Lord one thousand eight hundred and sixty-eight, between Henry C. Brown, of the county of Arapahoe, and Territory of Colorado, of the first part, and the Territory of Colorado, of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of one thousand dollars to the said party of the first part in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, and conveyed, and by these presents doth grant, bargain, sell, convey, and confirm, unto the said party of the second part, its successors and assigns, forever, all the following-described lot or parcel of land situate, lying, and being in the county of Arapahoe, and Territory of Colorado, to wit: Commencing at the southeast corner of the Congressional grant made by the United States to the city of Denver, in said county, to wit, the southeast corner of the west half of section thirty-four (34), in township (3) three south, of range (68) sixty-eight west, and running thence east on the south line of said section thirty-four (34) four hundred and twenty-four (424) feet; thence south at right angles with the south line of said section sixty (60) feet, which last point is the place of beginning of the description of the parcel of land hereinafter described; and commencing at said last point sixty (60) feet south of the south line of said section, and running thence south (600) six hundred feet; thence east parallel with the south line of said section (726) seven hundred and twenty-six feet; thence north at right angles (600) six hundred feet, and thence west to the place of beginning (726) seven hundred and twenty-six feet, containing ten acres, the same being situate in the northwest quarter of the northeast quarter of section (3) three, in township (4) four south, of range (68) sixty-eight west, the said land being so conveyed to said Territory in pursuance of the act entitled "An act to locate the seat of government of the Territory of Colorado," approved the 9th day of December, A. D. 1867, so as to vest the title to the same absolutely and in fee simple in said Territory, and to remain the property of said Territory, for the purpose of erecting a capitol and other public buildings thereon only.

40

To have and to hold the same, together with all and singular the appurtenances and privileges thereunto belonging or in any wise thereunto appertaining, and all the estate, right, title, interest, and claim whatso-

ever of the said party of the first part, either in law or equity, to the only proper use, benefit, and behoof of the said party of the second part, its successors and assigns, forever.

And the said party of the first part, the aforesaid parcel of land unto the said party of the second part, its successors and assigns, against
41 the claim or claims of all and every person whatsoever, he, the said Henry C. Brown, does and will warrant and forever defend by these presents.

In witness whereof the said party of the first part has hereunto set his hand and seal the day and year first above written.

HENRY C. BROWN. [SEAL.]

[Revenue stamp $1.00.]

Signed, sealed, and delivered in presence of—
S. E. BROWNE,
JOHN MECHLING.

TERRITORY OF COLORADO,
County of Arapahoe, ss:

I, S. E. Browne, a notary public in and for said county, in the Territory aforesaid, do hereby certify that Henry C. Browne, who is personally known to me as the person whose name is subscribed to the annexed deed, appeared before me this day in person and acknowledged that he signed, sealed, and delivered the said instrument of writing as his free and voluntary act, for the uses and purposes therein set forth.

Given under my hand and notarial seal this eleventh day of January, A. D. 1868.

[NOTARIAL SEAL.] S. E. BROWNE,
Notary Public.

EXHIBIT B.

42 Revocation of deed from Henry C. Brown to Territory of Colorado. Filed for record at 3¼ o'clock p. m. on May 9th, 1879.

Know all men by these presents that whereas I, the undersigned, Henry C. Brown, did on the eleventh (11th) day of January, A. D. 1868, by my deed bearing date on that day, and duly recorded in the recorder's office of Arapahoe County, State of Colorado, on page 570, in book 15 thereof, give, grant, and convey unto the then Territory (now State) of Colorado, its successors and assigns, the following described tract or parcel of land, situate, lying, and being in the county of Arapahoe and State of Colorado, described in said deed as follows, to wit: Commencing at the southeast corner of the Congressional grant made by the United States to the city of Denver, in said county, to wit, the southeast corner of the west half of section thirty-four (34), in township (3) three south, of range (68) sixty-eight west, and running thence east on the south line of said section thirty-four (34) four hundred and twenty-four (424) feet; thence south at right angles with the south line of said section sixty (60) feet, which last point is the place of beginning of the description of the parcel of land hereinafter de-

scribed, and commencing at said last point sixty (60) feet south of the south line of said section thirty-four (34), and running thence south six hundred (600) feet; thence east parallel with the south line of said section
43 (726) seven hundred and twenty-six; thence north at right angles six hundred (600) feet; and thence west to the place of beginning, seven hundred and twenty-six (726) feet, containing ten (10) acres; the same being situated in the northwest quarter of the northeast quarter of section (3) three, in township (4) four south, of range sixty-eight (68) west, the said land being so conveyed to said Territory in pursuance of the act entitled "An act to locate the seat of government of the Territory of Colorado," approved the 9th day of December, A. D. 1867, so as to vest the title to the same absolutely and in fee simple in said Territory, and to remain the property of said Territory for the purpose or erecting a capitol and other public buildings thereon only, &c.

And whereas neither the said Territory nor its successor, the State of Colorado, have ever accepted the said conveyance or located or erected a capitol or other public buildings on said tract of land as in and by said deed provided:

Now, therefore, in consideration of the premises and of other good and sufficient causes, I, the said Henry C. Brown, have and hereby do revoke, annul, and declare and make void and of no effect the aforesaid conveyance and all right, title, and interest therein granted to the said then Territory of Colorado, its successors and assigns.

In witness whereof I have hereunto set my hand and seal this 9th day of May, A. D. 1879.

HENRY C. BROWN. [WAFER SEAL.]

44 STATE OF COLORADO,
County of Arapahoe, ss:

I, William M. Maguire, a notary public in and for said county, in the State aforesaid, do hereby certify that Henry C. Brown, who is personally known to me to be the person whose name is subscribed to the annexed instrument in writing, appeared before me this day in person and acknowledged that he signed, sealed, and executed the said instrument of writing as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal this 9th day of May, A. D. 1879.

[NOTARIAL SEAL.] WILLIAM M. MAGUIRE,
Notary Public.

To which offer the counsel for defendant objected on the following grounds: That the Territory of Colorado had no right to take a conveyance of real estate at the time of the making of the deed without the consent of the Government of the United States for any purpose; and further, because the land described in the deed is shown by the deed itself to without the city of Denver, outside of it, beyond the city limits; because the deed shows on its face that it was made in pursuance of the act of the territorial legislature of the ninth of December, 1867, entitled "An act to locate the seat of government of the Territory of Colorado," found on page ninety of the Revised Statutes; and further, because the act to
45 locate the seat of government was repealed by article VIII, sections

II, III, and IV of the constitution of the State of Colorado; and further, because the Territory of Colorado, being the donee, could alone perform the conditions in the deed, the deed being upon conditions; but the objection was overruled by the court; to which ruling and decision of the court counsel for the defendant then and there excepted.

The plaintiff rests.

Counsel for the defendant here moved the court for a nonsuit against the plaintiff on the following grounds:

First. Upon the same identical grounds set forth in the objection to the deed, that the plaintiff had not shown evidence sufficient to support this action, had not shown title in the plaintiff, neither was there any evidence of acceptance on the part of the plaintiff or of the Territory of Colorado, no testimony showing that plaintiff ever possessed, occupied, or improved the land in any way. Next, the State could not maintain an action of ejectment at all, because the State could not be disseized. Next, because the deed was to the Territory of Colorado, and there was no evidence of title in the plaintiff. Next, because the capital of the State of Colorado is not located in Denver and never has been, and, therefore, the plaintiff had no right to maintain the action at this time. Next,
46 upon the ground that the deed was made with a condition, and there was no evidence whatever that the condition had been complied with by either the State or Territory; but the motion was denied by the court, and the question reserved for discussion.

The defendant here offered in evidence deed of revocation made by Henry C. Brown, to which offer counsel for plaintiff objected, but the objection was overruled, and the question reserved for discussion, a copy of which deed of revocation is appended to this bill of exceptions, marked B.

HENRY C. BROWN, being duly sworn on the part of the defendant, testified as follows:

Q. Are you the identical Henry C. Brown who executed this instrument in writing?

A. Yes, sir.

Q. Did you receive any money consideration for the execution of this deed?

(Objection, and question withdrawn.)

The defendant here offered to prove by the witness on the stand that while deed acknowledges the receipt of one thousand dollars, that, in fact, no money consideration whatever passed between the Territory of Colorado and the grantor, and that there was no consideration whatever, and that the deed was executed upon the condition that the property was conveyed to the Territory for the purpose of erecting capitol and other
47 public buildings thereon; to which offer counsel for the plaintiff here objected, on the ground that it was immaterial, irrelevant, and incompetent, and the objection was sustained by the court; to which ruling and decision of the court the counsel for the defendant then and there excepted.

The defendant here offered to show by the statute that it must be a donation; that it is a public law of the Territory, to which offer counsel for the plaintiff objected, on the ground that it was immaterial and incom-

petent, and the objection was sustained by the court; to which ruling and decision of the court counsel for the defendant then and there excepted.

Q. Mr. Brown, what was the consideration for the execution of that deed?

(To this question counsel for the plaintiff here objected on the same ground as before, and the objection was sustained by the court; to which ruling of the court counsel for the defendant then and there excepted.)

Q. Mr. Brown, what was the condition of this land at the time the deed was executed—the land described in the deed—was it improved or not?

A. It was unimproved every way.

Q. Did the Territory or State ever improve it in any way?

A. No, sir.

48 Q. Did they ever use it for any purpose?

A. They did not use it at all.

And which was all the evidence in said cause. And forasmuch as these matters do not appear of record herein, defendant prays that this his bill of exceptions may be signed and sealed and made part of the record, which is done accordingly.

(Signed) THOMAS MITCHELL, *Judge*. [SEAL.]

Agreed to.

C. W. WRIGHT,
Att'y-Gen'l.

(Endorsed as follows:) Presented to me this 14th April, 1880. Thomas Mitchell, judge. Also filed May 18, 1880. W. A. Dier, clerk.

STATE OF COLORADO,
Jefferson County, ss:

I, W. A. Dier, clerk of the district court within and for the county of Jefferson and State aforesaid, do hereby certify the above and foregoing to be a full, true, and complete copy of the transcript on change of venue from Arapahoe County, Colorado, with all exhibits thereto attached, as certified by the clerk of the district court of Arapahoe County, all entries of record in the district court of Jefferson County aforesaid, including the

49 final judgment of said court in said cause, the appeal bond in said cause with endorsement of approval thereon, and the bill of exceptions in said cause, and that I have truly copied the same from the original and the record of my office therein now remaining.

In witness whereof I have hereunto set my hand and attached the seal of said court at Golden, in said county, this first day of June, A. D. 1880.

[DIST. C'T SEAL, JEFFERSON CO.] W. A. DIER,
Clerk District Court.

(Endorsed as follows:) 734. Henry C. Brown, appellant, v. State of Colorado, appellee. Transcript. Filed in Supreme Court, Nov. 24, 1880. Keyes Danforth, clerk.

Assignment of errors.

In the supreme court of the State of Colorado.

STATE OF COLORADO, APPELLEE,
v.
HENRY C. BROWN, APPELLANT. } Assignment of errors.

50 The judgment in this case is erroneous, because:

I. The State cannot maintain a civil action, in the nature of ejectment or the action provided for in the code, of that nature, to try title to land.

II. The plaintiff has no legal capacity to sue.

III. The court erred in overruling defendant's demurrer to plaintiff's complaint.

IV. The court erred in vacating the judgment of nonsuit, and granting a new trial on plaintiff's motion.

V. The court erred in overruling the defendant's motion for a nonsuit.

VI. The court erred in receiving in evidence, on behalf of plaintiff, the deed from defendant, Brown, to the Territory of Colorado.

VII. The court erred in refusing to allow the defendant, Brown, to show that the consideration of $1,000.00, acknowledged as received in deed of defendant to the Territory of Colorado, was other than actual money.

VIII. The finding of the court is against the evidence.

IX. The finding of the court is against the law.

X. The judgment of the court is for the plaintiff instead of defendant.

XI. The finding is against the weight of the evidence.

BROWNE & PUTNAM, and
JAMES H. BROWN,
Att'ys for Appellant.

(Marked:) Filed Nov. 24, 1880, in supreme court. Keyes Danforth, clerk.

51 In supreme court, State of Colorado.

And now, on this 24th day of November, A. D. 1880, comes the said Henry C. Brown, and files herein his transcript of the record and assignment of errors on appeal from the judgment of the court for the first judicial district in and for the county of Jefferson, and the following proceedings were had and entered of record in said cause in this court, to wit:

And afterwards, and on, to wit, the 11th day of December, A. D. 1880, it being one of the regular judicial days of the December term, A. D. 1880, of said court, the following proceedings were had and entered of record in said cause in said court, to wit:

HENRY C. BROWN, APPELLANT,
v. 734.
STATE OF COLORADO, APPELLEE.

Appeal from district court of Jefferson County.

At this day comes said appellant, by S. E. Browne, esq., his attorney,

and said appellee, by C. W. Wright, esq., attorney-general, also comes; and, on motion of said appellee, it is ordered by the court that this cause be set down for hearing on the seventh (7th) day of January next.

And afterwards, and on, to wit, the seventh (7th) day of January, A. D. 1881, it being one of the judicial days of the December term, A. D.
52 1880, of said court, the following proceedings were had and entered of record in said cause in said court, to wit:

HENRY C. BROWN, APPELLANT,
v. } 734.
STATE OF COLORADO, APPELLEE.

Appeal from district court of Jefferson County.

53 At this day comes said appellant, by J. H. Brown, esq., his attorney, and said appellee, by C. W. Wright, esq., attorney-general, also comes; whereupon, it is ordered by the court that said appellant file his reply herein by the twenty-seventh (27th) instant, unless he shall elect to make oral argument in reply upon that day.

And heretofore, and on, to wit, the 13th day of December, A. D. 1880, came the appellee, by C. W. Wright, esq., attorney-general, and filed herein his joinder in error in said cause in said court, which is in words and figures as follows, to wit:

STATE OF COLORADO, *ss:*

In the supreme court. To the December term, A. D. 1880.

HENRY C. BROWN, APPELLANT,
v. } Appeal from Jefferson County.
STATE OF COLORADO, APPELLEE.

Comes appellee, by C. W. Wright, its attorney-general, and says there is no error in the record and proceedings of the court below.

C. W. WRIGHT,
Attorney-General.

(Endorsed:) 734. Henry C. Brown, appellant, v. State of Colorado, appellee. Joinder in error. Filed in supreme court Dec. 13, 1880. Keyes Danforth, clerk. C. W. Wright, att'y gen'l.

54 And afterwards, and on, to wit, the 4th day of February, A. D. 1881, it being one of the judicial days of the December term, A. D. 1880, of said court, the following proceedings were had and entered of record in said cause in said court, to wit:

HENRY C. BROWN, APPELLANT,
v. } 734.
STATE OF COLORADO, APPELLEE.

Appeal from district court of Jefferson County.

At this day comes said appellant, by J. H. Brown, esq., his attorney, and

said appellee, by C. H. Toll, esq., attorney-general, its attorney, also comes; and thereupon it is ordered by the court that this cause be set down for hearing on the twenty-fifth (25th) instant.

And afterwards, and on, to wit, the 25th day of February, A. D. 1881, it being one of the judicial days of the December term, A. D. 1880, of said court, the following proceedings were had and entered of record in said cause in said court, to wit:

HENRY C. BROWN, APPELLANT,
v. } 734.
STATE OF COLORADO, APPELLEE.

Appeal from dist. court of Jefferson County.

55 At this day comes said appellant, by J. H. Brown, esq., his attorney, and said appellee, by C. H. Toll, esq., attorney-general, also comes; and, by consent of parties, it is ordered by the court that this cause be set down for hearing on the 25th day of March next.

And afterwards, and on, to wit, the 25th day of March, A. D. 1881, it being one of the judicial days of the December term, A. D. 1880, of said court, the following proceedings were had and entered of record in said cause in said court, to wit:

HENRY C. BROWN, APPELLANT,
v. } 734.
STATE OF COLORADO, APPELLEE.

Appeal from dist. court of Jefferson County.

At this day comes said appellant, by S. E. Browne, esq., his attorney, and said appellee, by C. H. Toll, esq., attorney-general, also comes, and this cause is reset for hearing to-morrow morning at 10 o'clock.

And afterwards, and on, to wit, the 26th day of March, A. D. 1881, it being one of the judicial days of the December term, A. D. 1880, of said court, the following proceedings were had and entered of record in said cause in said court, to wit:

HENRY C. BROWN, APPELLANT,
v. } 734.
STATE OF COLORADO, APPELLEE.

Appeal from district court of Jefferson County.

56 At this day comes said appellant, by S. E. Browne and James H. Brown, esquires, his attorneys, and said appellee, by C. H. Toll, esq., attorney-general, also comes; and this cause is argued by said appellant and submitted to the consideration and judgment of the court.

And afterwards, and on, to wit, the 22nd day of April, A. D. 1881, it

being one of the judicial days of the April term, A. D. 1881, of said court, the opinion of the court in said cause heretofore, and on the 26th day of March last past, submitted for their decision, was filed herein, in words and figures as follows, to wit:

BROWN
v. } 734.
THE STATE.

Appeal from district court of Jefferson County.

ELBERT, J. C.:

This action was brought by the State to recover possession of certain real property known as the "Capitol grounds," situated in the city of Denver. The State had judgment below, and Brown appealed.

It is assigned for error: (1.) That the State cannot maintain a civil action in the nature of ejectment, or the action provided for in the code of that nature, to try title to land.

It is accepted law that a State as a political corporation may maintain in its corporate name and in its own courts actions for the enforcement of its rights, or the redress of its wrongs, independently of any statutory provision therefor. The right springs from the general principle,
57 that every person, whether natural or artificial, capable of making a contract, or suffering a wrong, may have an action to enforce the one and redress the other. (1 Dillon, Mun. Corp., 106; The People v. City of St. Louis, 5 Gilm., 366; Delafield v. The State of Ill., 2 Hill, 162; State of Indiana v. Warman, 6 Hill, 36.)

The proposition is broad and embraces in its general terms any and every form of action. In any given case the nature of the right to be enforced or the wrong to be redressed would determine the appropriate action. If the State, in a proper case, may not maintain ejectment, then it is an exception to this general rule.

The claim is that disseizen is essential to the action, that the State cannot be disseized, and, therefore, cannot maintain the action.

If we do not discuss the conclusion drawn from these premises, it is not because we admit it. On the other hand, we seriously doubt the propriety of a rule which allows a defendant to plead a prerogative of the State to protect himself in a wrong against the State.

There is, however, a fault in the premises that is fatal to the proposition. Disseizen, however it may have been formerly, is not necessary to the maintenance of the action substituted by the code for ejectment. Disseizen implies an actual entry and actual adverse possession. "Disseizen of things corporal, as of houses, lands, &c., must be by entry and actual
58 dispossession of the freehold, as, if a man enters by force of fraud into the house of another, and turns, or at least keeps him or his servants out of possession." (Bouvier Law Dic.)

Under the provisions of the code, an actual entry or actual adverse possession is not essential.

By section 248 it is provided, "If the premises are not actually occupied, the action may be brought against any person exercising acts of ownership on or over the premises claimed, or who claims title thereto or some interest therein at the time of the commencement of the action."

By this section an adverse claim of title to or interest in the premises is sufficient to support the action.

Under a similar provision in the New York code, it is held that ejectment for premises not actually occupied, may be brought by one claiming title at the commencement of the suit, though his claim has been manifested by words merely. (Banyer et al. vs. Empie, 5 Hill, 48. Child vs. Chappell, 9 N. Y., 246.)

It is also held that although the averments of prior possession and ejectment are made in the declaration, it is not necessary to prove them, as they are merely formal. (Tyler on Eject., 616, and cases there cited.)

We must accordingly hold that, as against this objection, the action is maintainable by the State.

It is assigned: (2.) That the plaintiff has no legal capacity to sue.

59 The point made is that the complainant is entitled "The State of Colorado, plaintiff," &c., instead of "The People of the State of Colorado," in which name all process is required to run, by sec. 30, art. 6, of the constitution. To this it is only necessary to say that the State means the whole people united in one body politic, and "the State," and "the people of the State," are equivalent expressions. (1 Story Const., § 361; Pennhallow vs. Doane, 3 Dal., 93.)

It is assigned (3): The court erred in overruling defendant's demurrer to plaintiff's complaint.

The principal points raised by the demurrer were the two which we have just considered, and, if the views we have already expressed are correct, the demurrer was properly overruled.

It is assigned (4): The court erred in vacating the judgment of nonsuit, and granting a new trial on plaintiff's motion.

Judgment of nonsuit was entered in a trial had before Judge Bowen at the January term, 1870, of the district court for the county of Arapahoe, at which time plaintiff gave notice of a motion for a new trial. At the succeeding special March term of the court this motion was heard, and a new trial granted. At the same term the venue of the cause was changed to the county of Jefferson, in the first district. Afterwards, at the April term of the district court for the county of Jefferson, a trial was had before Judge Mitchell, which resulted in a judgment for

60 the plaintiff. This is the judgment appealed from, and the errors of which we are called upon to review.

If there was error in vacating the judgment of nonsuit and granting a new trial, it was an error occurring in a former trial, the record of which is not before us. If the error was allowed, it would go to a judgment other than the one appealed from. The pleadings in the case, and the proceedings on the new trial, constitute the record we are reviewing. An error occurring in a former trial must be reached in some other way.

It is assigned (5): The court erred in overruling the defendant's motion for nonsuit.

All the questions embraced in the motion for nonsuit are considered under other assignments, for which reason it is not necessary to consider them under this.

It is assigned (6): The court erred in receiving in evidence on behalf of the plaintiff, the deed from defendant Brown conveying the premises in dispute to the Territory of Colorado.

61 Four objections are urged to the admissibility of the deed. (1), Because the lands conveyed are not "within the limits of the city of Denver" as required by the act of the legislature (R. S., 90, secs. 2 and 3). Section one of this act located and established the seat of government at Denver. Section two provided for the appointment of three commissioners on behalf of the Territory to select a site within the city of Denver for the capitol of said Territory. Section three directs that the commissioners shall, within sixty days, "proceed to select a site for the capitol of said Territory within the said city of Denver, which site shall contain not less than ten acres of land," &c.

Whether the site conveyed was within the corporate limits of the city of Denver at the date of the conveyance in 1868, does not appear, except in so far as a presumption may be indulged that the limits prescribed by statute in 1866 (Sess. Laws 1866), two years prior to the conveyance, remain unchanged. This presumption is not very strong in view of the fact that the limits as fixed by the act were liable under the provisions of sect. 3 of the act to be changed at any time by any owner of adjoining lands surveying, platting, and recording an addition to the city. Accepting the presumption, however, as legitimate, we find that the site selected and conveyed was sixty feet south of the city limits as prescribed by the act of 1866.

62 This certainly is not a wide departure from the directions of the act if we were to accept the construction that the site was to be within the corporate limits of the city. This construction, however, is by no means a necessary one.

By section one the legislature located the seat of government "at Denver." Did they mean anything else in sections two and three, where they use the phrase "within the city of Denver"? Would not any more definite intention have been more definitely declared? In view of the nature of the act to be done, the necessity not only for a convenient, but also an appropriate and fitting site for capitol buildings, the difficulty of securing so large a tract of ground in a body in any platted city, the construction is not an unreasonable one. This was evidently the construction put on the act both by the appellant Brown and the commissioners, for the deed recites the title of the act, and declares the conveyance made in pursuance thereof.

Three propositions may be stated:

(1.) If the construction was erroneous, and the site selected therefor not within the intent of the act, it was for the State to object. Not having objected, but, on the other hand, acquiesced in the selection for a long term of years, the State is to be taken as having adopted and ratified not an illegal act, but the construction of the law put upon it by *by* its public agents, and which brought the site selected within the intent and meaning of the law.

63 (2.) If Brown was acting in good faith at the date of the conveyance, and we take it for granted he was, this was the construction he placed upon the law, for his conveyance was made "in pursuance of the act." Having acted under this construction, having acquiesced in it for a long period of years in common with the State, and having received the presumable benefits arising from such a location on his land, he is not at liberty to abandon it at pleasure, and to insist upon another construction which would avoid his conveyance.

(3.) Where a construction of a statute is not an unreasonable one, and parties have acted upon and acquiesced in it for a long period of time, justice requires that courts, for the maintenance of property rights acquired under it, should uphold the construction given by the parties.

It is objected to the deed (2) "that there was no acceptance of the donation, either express or implied." The possession of the deed and its record are prima facia evidence of its delivery to and acceptance by the commissioners, (2 Greenleaf Ev., sec. 29,) and no other or further acceptance was necessary.

The act itself accepts the property upon the conveyance being made in pursuance of its provisions. It says: "If the site so selected shall be conveyed to the Territory of Colorado, * * * so as to vest the title to the same absolutely and in fee-simple in said Territory, the site so selected shall be and remain the property of said Territory.

It is objected (3) "that there was no evidence of a performance
64 of the condition mentioned in the deed, and the act under which the deed was made."

Section third is as follows: "The persons appointed shall within *shall within* sixty days proceed to select a site for the capitol of said Territory within the said city of Denver; * * * and if the site so selected shall be conveyed to the Territory of Colorado by the person or persons holding the title thereto, without charge to said Territory, and so as to invest the title to the same absolutely and in fee-simple in said Territory, the site so selected shall be and remain the property of said Territory for the purpose of erecting a capitol and other public buildings thereon."

The conveyance of Brown recites, "the said land being so conveyed to said Territory in pursuance of an act entitled 'An act to locate the seat of government of the Territory of Colorado,' * * * so as to vest the title to the same absolutely and in fee-simple in said Territory, and to remain the property of said Territory for the purpose of erecting a capitol and other public buildings thereon only."

If any condition exists here it is a condition subsequent. A condition subsequent is one operating on an estate already created and vested, and rendering it liable to be defeated.

Whether a proper interpretation of the language of the conveyance with reference to the statute would result in a decision that it was absolute and unconditional, or upon a condition subsequent, which upon location
65 and erection of capitol buildings elsewhere would work a forfeiture, it is not necessary to say.

If we accept the theory of the appellant and treat the conveyance as conditional, the only condition expressed relates to the use of the premises, i. e., for the purpose of erecting capitol and other buildings "thereon only."

There is no pretence that there has been a forfeiture by use of the grounds for other purposes than those specified. The proposition that the provision in the constitution for submitting the question of the permanent location of the seat of government to the qualified electors of the State works a forfeiture in advance of any action under it need not be argued. Until the election provided for the constitution continues the seat of government at Denver, and the election may have no other result; but whatever the result may be, as yet there is no act of forfeiture under

the constitutional provision. This is the only express condition of the deed, and of this there has been no breach.

The appellant claims that the forfeiture of the State to commence the erection of capitol buildings on the site is a breach of the conditions of the deed. If so, it is a breach of an implied, and not an express condition, for no where do we find any time limited within which capitol buildings must be commenced or completed.

It is a rule of law that conditions of forfeiture in grants are not favored, and will not be readily implied. (2 Par. Con., 526.) They must be created by express terms or clear implication, and are
66 construed strictly. (2 Wash. R., p. 447, and cases cited.) Says Mr. Kent, they are to be construed with great strictness, because they tend to destroy estates, and the rigorous exaction of them is a species summum jus, and in many cases hardly reconcilable with conscience. (4 Kent's Com., 130.)

In New York it is held that conditions cannot be sustained by inference or recital. (Woodworth vs. Payne, 74 N. Y., 198. That there must be some words which ex vi termini import that the vesting or continuance of the estate is to depend upon the supposed condition. (Craig vs. Wells, 11 N. Y., 320.)

No words are to be found in the deed of Brown which indicate any intention to limit or fix the time within which the State is to commence the erection of its capitol buildings. The language of a deed is to be construed most strongly against the grantor and beneficially for the grantee. It is the language of the grantor, and the principle of self-preservation and self-interest are supposed to make him sufficiently careful not to prejudice his own interest. (Broom's Leg. Max., 594.) The deed being entirely silent upon the subject, the clear and rational conclusion is that the grantor was willing to leave the time for commencing its public buildings to the determination of the State. If such was not the intention, it is the grantor's own fault that such a condition was not inserted in the deed. This court cannot, upon some supposed hardship, defeat an estate by implying a condition which the grantor has not expressed,
67 nor in the least intimated, by the language of his conveyance.

If it can be said as is claimed that there is an implied condition that the State should commence and erect its buildings within a reasonable time, I do not see that any other result can be arrived at.

Capitol buildings are usually large structures, requiring large sums for their construction and involving increase of the public indebtedness. When a young State is sufficiently strong financially for such an expenditure, is a question for its prudent statesmanship to determine, looking to the best interests of the public. Rented government buildings served the purpose of the Territorial government, as they have and do serve the purpose of our present State government, and who shall say that both Territorial and State legislatures have not acted wisely and prudently in this postponement of an undertaking which would largely increase the public burthens? Who shall say that there has been a delay for an unreasonable time, having reference to our sparse population, slender revenues, and other prudential considerations, which control legislation in the public interest?

When the grantor failed to insert in his conveyance for his own protection a condition fixing a time within which the State should act in this mat-

ter, he thereby tacitly subordinated his individual interests, not perhaps to the mere will and pleasure of the State, but certainly to the interests
68 of the State, and if any condition of reasonable time can be implied, it must be measured largely if not exclusively by the interests of the public.

To imply a condition that would require the State to build within a reasonable time, having reference to the individual interests of the grantor would be to make to that extent a contract for the parties.

Tested by this rule, we are not able to say that the State has unreasonably delayed the erection of capitol buildings.

The fourth objection to the deed is based on the supposed effect of the constitutional provision submitting the location of the seat of government to a vote of the people, and has already been considered. The same considerations are applicable to the further claim that the Territory could not accept the grant, because, under section 12 of the organic act, any subsequent legislature had the power to change the seat of government to some other place. This is nothing more than saying that the grantee could not take because it had the power to forfeit the grant by breach of its conditions. Such a power in the grantee is presupposed in every conditional grant, otherwise there would be no necessity for a condition. The objections urged against the admissibility of the deed were not well founded, and it was properly received as evidence of the plaintiff's title.

It is assigned (7): The court erred in refusing to allow the defendant, Brown, to show that the consideration of $1,000 acknowledged as
69 received in the deed * * * was other than actual money. For some purposes the consideration of a deed may be shown to be different from that which is expressed. But the rule is that this cannot be allowed for the purpose of avoiding the deed or varying its effect.

Mr. Washburn states the rule as follows: Although it is always competent to control the fact stated in the deed as to the amount or thing paid in a question involving the recovery of the purchase-money, or as a measure of damages in an action upon the covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid in order to affect the validity of the deed in creating or passing a title to the estate thereby granted. (3 Wash. R., p. 614*.) Again he says, the true doctrine is stated in Grant vs. Townsend, 2 Hill, 554, that where a deed acknowledges the receipt of a consideration, the grantee, and all claiming under him, are estopped from denying that one was paid. They may disprove the payment for the purpose of recovering the consideration money, but they cannot do so for the purpose of destroying the effect and operation of the deed. Ib. 619*.

The authorities cited by counsel for appellant lay down no different doctrine.

There was no error in excluding the evidence.

We have thus considered all the questions raised by the record which we deem entitled to notice.

The same questions are not infrequently presented in several forms, and at different stages of the trial, but the views we have expressed
70 are *are* equally applicable in whatever form the questions may have arisen.

The sum of the matter is this: On the 11th day of January, 1868, the

appellant, Brown, for a good and valuable consideration, "granted, bargained, sold, and conveyed" to the Territory of Colorado, the premises in dispute, by a good and sufficient deed, duly signed, sealed, and acknowledged in accordance with all the forms of law. We find no good reason for not enforcing the rights of the State under this deed. In dealing with it we are governed by certain well settled rules. It must be interpreted "that the matter may be of validity sooner than be lost," or as the maxim runs, ut res majis valeat quam pereat. Such a meaning must be given it as may carry out and effectuate to the fullest extent the intention of the parties. (Broom's Leg. Max. 541 *.) If it contains express conditions they are to be construed strieti juris. (4 Kent. supra.) If conditions are to be implied it must be with caution, upon clear grounds, and from words which, ex vi termini, import that the vesting or continuance of the estate is to depend upon the supposed condition. (Craig vs. Wells, 11 N. Y., 320.)

We do not decide that the deed is conditional, but for the purposes of this case we have treated it as conditional, and find no sufficient ground for saying that the grant has been defeated or forfeited by reason of a breach of its supposed conditions, either express or implied.

The judgment of the court below is affirmed.

Judgment affirmed.

71 And afterwards, and on the same day, to wit, the 22nd day of April, A. D. 1881, it being one of the judicial days of the April term, A. D. 1881, of said court, the following proceedings were had and entered of record in said cause in said court to wit:

HENRY C. BROWN, APPELLANT,
v. 734.
STATE OF COLORADO, APPELLEE.

Appeal from district court of Jefferson County.

At this day, this cause coming on to be heard, as well upon the transcript of proceedings and judgment had in said district court in and for the county of Jefferson, as upon the matters assigned for error herein; and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court; and it appearing to the court that there is no error in the proceedings and judgment aforesaid; it is, therefore, considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, affirmed, and stand in full force and effect; and that said appellee do have and recover of and from said appellant its costs in this behalf expended, to be taxed, and that it have execution therefor. And let the opinion of the court, filed herein be recorded.

And said appellant, by S. E. Browne, esq., his attorney, excepts to the judgment and opinion announced, and fifteen (15) days from this day in which to prepare his bill of exceptions is given said appellant.

72 And afterwards, and on, to wit, the 30th day of August, A. D. 1881, it being a day in vacation succeeding the April term, A. D. 1881, of said court, came the said appellant, Henry C. Brown, by his attorney, James H. Brown, esq., and filed herein his appeal bond, bill of exceptions, assignment of errors, and precipe, on writ of error to the

Supreme Court of the United States, marked, respectively, B, E, F, and G, in words and figures as follows, to wit:

Appeal bond (marked "B").

Appeal bond. Supreme court of Colorado.

THE UNITED STATES OF AMERICA,
State of Colorado:

Know all men by these presents that we, Henry C. Brown, as principal, and William F. McClelland, as surety, are held and firmly bound unto the State of Colorado, in the full and just sum of three hundred ($300) dollars, to be paid to the said State of Colorado; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this 13th day of May, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately at the April term, A. D. 1881, of the supreme court of the State of Colorado, in a suit pending in said court between the
73 State of Colorado, appellee, and Henry C. Brown, appellant, judgment was rendered against the said appellant, Henry C. Brown, and the said appellant, Henry C. Brown, having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Colorado, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Henry C. Brown shall prosecute said writ to effect, and answer all damages and costs if he fails to make good his plea, then the above obligation to be void; otherwise to remain in full force and virtue.

HENRY C. BROWN. [SEAL.]
WILLIAM F. McCLELLAND. [SEAL.]

Approved May 13, 1881.

S. H. ELBERT, *Judge.*

(Endorsed as follows:) 734. B. Supreme court of the State of Colorado. Henry C. Brown, pl'ff in error, vs. State of Colorado. Appeal bond. $300. Filed in supreme court Aug. 30, 1881. Keyes Danforth, clerk.

Assignment of errors.

Supreme Court of the United States.

74 HENRY C. BROWN, PLAINTIFF IN ERROR,)
v. } In error.
STATE OF COLORADO, DEFENDANT IN ERROR.)

Of October term, in the year of our Lord one thousand eight hundred and eighty-one.

Afterwards, to wit, on the second (2nd) Monday of October, in this same

term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Henry C. Brown, in person, and by James H. Brown, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

I. That the declaration aforesaid, and the matters therein contained, are not sufficient in law for the said State of Colorado to have or maintain its aforesaid action thereof against the said Henry C. Brown.

II. The State cannot maintain a civil action in the nature of ejectment or the action provided for in the code of that nature to try title to land.

III. The plaintiff has no legal capacity to sue.

IV. The court erred in overruling defendant's demurrer to plaintiff's complaint.

V. The court erred in vacating the judgment of nonsuit and granting a new trial on plaintiff's motion.

VI. The court erred in overruling the defendant's motion for nonsuit.

75 VII. The court erred in receiving in evidence, on behalf of plaintiff, the deed from defendant, Brown, to the Territory of Colorado.

VIII. The court erred in refusing to allow defendant, Brown, to show that the consideration of $1,000.00, acknowledged as received in deed of defendant to the Territory of Colorado, was other than actual money.

IX. The finding of the court is against the evidence.

X. The finding of the court is against the law.

XI. The judgment of the court is for the plaintiff instead of defendant.

XII. The finding is against the weight of the evidence.

XIII. That by the record aforesaid it appears that the judgment aforesaid given was given for the said State of Colorado against the said Henry C. Brown, whereas by the law of the land the said judgment ought to have been given for the said Henry C. Brown against the said State of Colorado; and the said Henry C. Brown prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, and for the costs in this behalf paid, laid out, and expended.

HENRY C. BROWN,
Plaintiff in Error, pro se,
And by JAMES H. BROWN,
Attorney for Plaintiff in Error.

76 (Endorsed as follows, and marked "F":) Supreme Court of the United States. Henry C. Brown, plaintiff in error, vs. State of Colorado, defendant in error. Assignment of errors. Filed in supreme court, State of Colorado, Aug. 30, 1881. Keyes Danforth, clerk.

Bill of exceptions (marked E).

77 STATE OF COLORADO, *ss:*

In the supreme court. April term, A. D. 1881.

STATE OF COLORADO, APPELLEE,
vs.
HENRY C. BROWN, APPELLANT.

Appeal from district court of Jefferson County.

Be it remembered that on this twenty-second (22nd) day of April, A. D. 1881, at the above term, this cause coming on to be heard on the assignments of errors and briefs, arguments, and reply on behalf of appellant, as well as the answer on behalf of the appellee, the court delivered the following opinion, to wit:

HENRY C. BROWN
vs.
THE STATE OF COLORADO.

Appeal from district court of Jefferson County.

ELBERT, *C. J.:*

This action was brought by the State to recover possession of certain real property, known as the "Capitol grounds," situated in the city of Denver. The State had judgment below, and Brown appealed.

It is assigned for error (1) that the State cannot maintain a civil action in the nature of ejectment, or the action provided for in the code of that nature to try the title to land.

It is accepted law that a State, as a political , may maintain in its corporate name and in its own courts actions for the enforcement of
78 its rights or the redress of its wrongs, independently of any statutory provision therefor. The right springs from the general principle that every person, whether natural or artificial, capable of making a contract, or suffering wrong, may have an action to enforce the one and to redress the other. (1 Dillon Mun. Corp., 106; The People v. The City of St. Louis, 5 Gill, 366; Delafield v. State of Ill., 2 Hill, 162; State of Ind. v. Warman, 6 Hill, 36.)

The proposition is broad and embraces in its general terms any and every form of action. In any given case the nature of the right to be enforced or the wrong to be redressed would determine appropriate action.

If the State in a proper case may not maintain ejectment, then it is an exception to the general rule. The claim is that disseizin is essential to the action; that the State cannot be disseized, and therefore cannot maintain the action.

If we do not discuss the conclusion drawn from these premises, it is not because we admit it. On the other hand, we seriously doubt the propriety of a rule which allows a defendant to plead a prerogative of the State to protect himself in a wrong against the State. There is, however, a fault in the premises that is fatal to the proposition. Disseizen, however it

may have been formerly, is not necessary to the maintenance of the action, substituted by the code for ejectment. Disseizin implies an entry and actual adverse possession. Disseizin of things corporal, as of houses, lands, etc., must be by entry and actual dispossession of the freehold, as if a man enters by force or fraud into the house of another and turns
79 or at least keeps him or his servants out of possession. (Bouvier's Law Dic.)

Under the provisions of the code an actual entry or actual adverse possession is not essential.

By section 248 it is provided: "If the premise are not actually occupied the action may be brought against any person exercising acts of ownership on or over the premises claimed, or who claims title thereto, or some interest therein, at the time of the commencement of the action."

By this action an adverse claim of title to or interest in the premises is sufficient to support the action.

Under a similar provision in the New York code it is held that ejectment for premises not actually occupied may be brought by one claiming title at the commencement of the suit, though his claim has been manifested by words merely. (Banyer et al. vs. Easpie, 5 Hill, 48; Child vs. Chappell, 9 New York, 246.)

It is also held that although the accounts of prior possession and ejectment are made in the declaration it is not necessary to prove them, as they are merely formal. (Tyler on Ejectments, 616, and cases there cited.)

We must accordingly hold that as against this objection the action is maintainable by the State.

It is assigned (2): That the plaintiff has no legal capacity to sue. The point made is that the complaint is entitled "The State of Colorado, plaintiff," etc., instead of "The people of the State of Colorado," in which name all process is required to run by section 30, article 6 of the constitution. To this it is only necessary to say that the State means the
80 whole people united in one body politic, and "the State" and the people of the State are equivalent expressions. (Penhollow vs. Doane, 3 Dall., Penn., 93; 1 Story's Con., sec. 361.)

It is assigned (3): The court erred in overruling defendant's demurrer to plaintiff's complaint.

The principal points raised by the demurrer were the two which we have just considered, and if the views which we have already expressed are correct the demurrer was properly overruled.

It is assigned (4): The court erred in vacating the judgment of nonsuit and granting a new trial on plaintiff's motion.

Judgment of nonsuit was entered in a trial had before Judge Bowen at the January term, 1880, of the district court for the county of Arapahoe, at which time plaintiff gave notice of a motion for a new trial. At the succeeding March term of the court this motion was heard and a new trial granted. At the same term the venue of the cause was changed to the county of Jefferson in the same district. Afterwards, at the April term of the district court for the county of Jefferson, a trial was had before Judge Mitchell, which resulted in a judgment for the plaintiff. This is the judgment appealed from, and the errors of which we are called upon to review. If there was an error in vacating the judgment of nonsuit and granting a new trial it was an error occurring in a former trial, the record of which

is not before us. If the error was allowed, it would go to a judgment other than the one appealed from. The pleadings in the case and the proceedings on the new trial constitute the record we are reviewing. An error occurring in a former trial must be reached in some other way.

81 It is assigned (5): The court in overruling the defendant's motion for nonsuit.

All the questions embraced in the motion for nonsuit are considered under other assignments, for which reason it is not necessary to consider them under this.

It is assigned (6): The court erred in receiving in evidence on behalf of the plaintiff the deed from defendant, Brown, conveying the premises in dispute to the Territory of Colorado.

Four objections are urged to the admissibility of the deed. (1.) Because the lands conveyed are not "within the city of Denver," as required by the act of the legislature. (R. S., 90, sect. 2 & 3.)

Section 1 of this act located and established the seat of government at Denver.

Section 2 provided for the appointment of three commissioners on behalf of the Territory, to select a site within the city of Denver for the capitol of said Territory.

Section 3 directs that the commissioners shall, within sixty days, "proceed to select a site for the capitol of said Territory within the said city of Denver, which site shall contain not less than ten acres of land," etc. Whether the site conveyed was within the corporate limits of the city of Denver, at the date of the conveyance in 1868, does not appear, except in so far as a presumption may be indulged; that the limits prescribed by statute in 1866 (Ses. Laws 1866), two years prior to the conveyance, remained unchanged. This presumption is not very strong, in view of the fact that the limits, as prescribed by the act, were liable, under the provisions

82 of section 3 of the act, to be changed at any time by any owner of adjoining lands surveying, platting, and recording an addition to the city.

Accepting the presumption, however, as legitimate, we find that the site selected and conveyed was sixty feet south of the city limits as prescribed by the act of 1866. This certainly is not a very wide departure from the directions of the act, if we were to accept the constructions that the site was to be within the corporate limits of the city.

This construction is by no means a necessary one.

By section 1 the legislature located the seat of government "at Denver." Did they mean anything else in sections two and three, where they use the phrase "within the city of Denver?" Would not any more definite intention been more definitely declared? In view of the nature of the act to be done, the necessity, not only for a convenient, but also an appropriate and fitting site for capitol buildings, the difficulty of securing so large a body in any platted city, the construction is not an unreasonable one. This was evidently the construction put on the act by the appellant, Brown, and the commissioners, for the deed recites the title of the act and declares the conveyance made in pursuance thereof. Three propositions may be stated:

(1.) If the construction was erroneous, and the site selected, therefore, not within the intent of the act, it was for the State to object; not having objected, but, on the other hand, having acquiesced in the selection for a

long term of years, the State is to be taken as having adopted and ratified not an illegal act, but the construction of the law put upon it by its public agents, and which brought the site selected within the intent
83 and meaning of the law.

(2.) If Brown was acting in good faith at the time of the conveyance, and we take it for granted he was, this was the construction which he placed upon the law, for his conveyance is made "in pursuance of the act." Having acted under this construction, having acquiesced in it for a long period of years in common with the State, and having received the presumable benefits arising from such a location on his land, he is not at liberty to abandon it at pleasure and to insist upon another construction which would avoid his conveyance.

(3.) When a construction of a statute is not an unreasonable one, and parties have acted upon and acquiesced in it for a long period of time, justice requires that courts, for the maintenance of property rights acquired under it, should uphold the construction given by the parties.

It is objected to the deed (2) that "there was no acceptance of the donation, either express or implied."

The possession of the deed and its record are prima facie of its delivery to and acceptance by the commissioners (2 Greenleaf Ev., sec. 29), and no other or further acceptance was necessary.

The act itself accepts the property upon the conveyance being made in pursuance of its provisions. It says: "If the site so selected shall be conveyed to the Territory of Colorado * * * so as to vest the title to the same absolutely and in fee-simple in said Territory, the site so selected shall and remain the property of said Territory," etc.

It is objected (3) that there was no evidence of a performance of
84 the condition mentioned in the deed and the act under which the deed was made.

Section 3 is as follows: "The persons appointed * * * shall within sixty days * * * proceed to select a site for the capitol of said Territory, within said city of Denver, * * * and if the site so selected shall be conveyed to the Territory of Colorado by the person or persons holding the title thereto without charge to said Territory, and so as to invest the title to the same absolutely and in fee-simple in said Territory, the site so selected shall be and remain the property of said Territory for the purpose of erecting a capitol and other public buildings thereon."

The conveyance of Brown recited: "The said land being so conveyed to said Territory in pursuance of an act to locate the seat of government of the Territory of Colorado * * * so as to vest the title to the same absolutely and in fee-simple in said Territory and to remain the property of said Territory for the purpose of erecting a capitol and other public buildings thereon."

If any condition exists here, it is a condition subsequent. A condition subsequent is one operating on an estate already created and vested, and rendering it liable to be defeated. Whether the proper interpretation of the language of the conveyance with reference to the statute would result in a decision that it was absolute and unconditional, or upon a condition subsequent which upon location and erection of the capitol buildings elsewhere would work a forfeiture, it is not necessary to say.

85 If we accept the theory of appellant and treat the conveyance as conditional, the only condition expressed relates to the use of the premises i. e., for the purpose of erecting capitol and other buildings "thereon only." There is no pretence that there has been a forfeiture by use of the ground for other purposes than those specified.

The proposition that "the provision in the constitution for submitting the question of the permanent location of the seat of government to the qualified electors of the State" works a forfeiture in advance of any action under it need not be argued. Until the election provided for the constitution continues the seat of government at Denver, and the election may have no other result. But whatever the result may be, as yet there is no act of forfeiture under this constitutional provision. This is the only express condition of the deed, and of this there has been no breach.

The appellant claims that the failure of the State to commence the erection of capitol buildings on the site is a breach of the condition of the deed. If so, it is a breach of an implied and not an express condition, for nowhere do we find any time limited within which capitol buildings must be commenced or completed. It is a rule of law that conditions of forfeiture in grants are not favored and will not readily be implied (2 Par. Con., 526); they must be created by express terms or clear implication, and are construed strictly. (2 Wash. R., p. 447). Says Mr. Kent: "They are to be construed with great strictness, because they tend to destroy estates, and the rigorous exaction of them is a species of summum jus, and in many cases hardly reconcilable with conscience." (4 Kent's Com., 130.)

In New York it is held that conditions cannot be sustained by inference or recital (Woodworth vs. Payne, 74 New York, 198); that there must be some words which ex vi termini import that the vesting or continuance of the estate is to depend upon the supposed condition. (Craig vs. Wells, 11 N. Y., 320.)

No words are to be found in the deed of Brown which indicate any intention to limit or fix the time within which the State is to commence the erection of its capitol buildings. The language of a deed is to be construed most strongly against the grantor and beneficially for the grantee. It is the language of the grantor, and the principle of self-preservation and self-interest are supposed to make him sufficiently careful not to prejudice his own interest. (Broom's Leg. Max., 594.)

The deed being entirely silent upon the subject, the clear and rational construction is that the grantor was willing to leave the time for commencing its public buildings to the determination of the State. If such was not the intention, it is the grantor's own fault that such a condition was not inserted in the deed.

This court cannot upon some supposed hardship defeat an estate by implying a condition which the grantor has not expressed nor in the least intimated by the language of his conveyance.

If it can be said, as is claimed, that there is an implied condition that the State should commence and erect its buildings within a reasonable time, I do not see that any other result can be arrived at. Capitol buildings are usually large structures, requiring large sums for their construc-

86 tion, and involving increase of the public indebtedness. When a young State is sufficiently strong financially for such an expend-

iture is a question for its prudent statesmanship to determine, looking to the best interests of the public. Rented government buildings served the purpose of the Territorial government as they have and do serve the purpose of our present State government, and who shall say that both Territorial and State legislatures have not acted wisely and prudently in this postponement of an undertaking which would largely increase the public burthens? Who shall say that there has been a delay for an unreasonable time, having reference to our sparse population, slender revenues, and other prudential considerations, which control legislation in the public interest?

When the grantor failed to insert in his conveyance, for his own protection, a condition fixing a time within which the State should act in this matter, he thereby tacitly subordinated his individual interests, not perhaps to the mere will and pleasure of the State, but certainly to the interests of the State, and if any condition of reasonable time can be implied, it must be measured largely, if not exclusively, by the interests of the public.

To imply a condition that would require the State to build within a reasonable time, having reference to the individual interests of the grantor, would be to make to that extent a contract for the parties. Tested by this rule we are not able to say that the State has unreasonably delayed the erection of capitol buildings.

The fourth objection to the deed is based on the supposed effect of the constitutional provision submitting the location of the seat of government to a vote of the people, and has already been considered. The same considerations are applicable to the further claim that the Territory could not accept the grant because under section 12 of the organic act any subsequent legislature had the power to change the seat of government to some other place. This is nothing more than saying that the grantee could not take because it had the power to forfeit the grant by breach of the conditions. Such a power in the grantee is presupposed in every conditional grant, otherwise there would be no necessity for a condition. The objections urged against the admissibility of the deed were not well founded, and it was properly received as evidence of the plaintiff's title.

It is assigned (7): The court in refusing to allow defendant, Brown, to show that the consideration of $1,000, acknowledged as received in the deed, * * * was other than actual money.

For some purposes the consideration of a deed may be shown to be different from that which is expressed; but the rule is that this cannot be allowed for the purpose of avoiding the deed or varying its effect. Mr. Washburne states the rule as follows: "Although it is always competent to control the fact stated in the deed as to the amount or thing paid in a question involving the recovery of the purchase-money, or as a measure of damages in actions upon covenants in the deed, it is not competent to contradict the acknowledgment of a consideration paid in order to
87 affect the validity of the deed in creating or passing a title to the estate thereby granted," etc. (3 Wash. R., p. 614.)

Again, he says the true doctrine is stated in Grant v. Townsend, 2 Hill, 554, that when a deed acknowledges the receipt of a consideration the grantor and all claiming under him are estopped from denying that one was paid.

They may disprove the payment for the purpose of recovering the consideration money, but they cannot do so for the purpose of destroying the effect and operation of the deed. (Ib., 619.)

The authorities cited by counsel for appellant lay down no different doctrine.

There was no error in excluding the evidence.

We have thus considered all the questions raised by the record which we deem entitled to notice.

The same questions are not unfrequently presented in several forms and at different stages of the trial, but the views we have expressed are equally applicable in whatever form the questions may have arisen.

The sum of the matter is this: On the 11th day of January, 1868, the appellant, Brown, for a valuable consideration, granted, bargained, sold, and conveyed to the Territory of Colorado the premises in dispute by a good and sufficient deed, duly sealed, signed, and acknowledged in accordance with all the forms of law. We find no good reason for not enforcing the rights of the State under this deed. In dealing with it we are governed by certain well settled rules.

It must be interpreted "that the matter may be of validity sooner than lost," or, as the maxim runs, "Ut res magis valeat, quam pereat." Such a meaning must be given it as may carry out and effectuate to the fullest extent the intention of the parties. (Brooms, seg. Max., 541.) If it contains express conditions, they are to be construed strieti juri. (4 Kent, supra.)

If conditions are to be implied, it must be with caution, upon clear grounds and from words which, ex vi termini, import that the vesting or continuance of the estate is to depend upon the supposed condition. (Craig vs. Wells, 11 N. Y., 320.)

We do not decide that the deed is conditional, but for the purpose of this case we have treated it as conditional, and find no sufficient ground for saying that the grant has been defeated or forfeited by reason of a breach of its supposed conditions, either express or implied.

The judgment of the court below is affirmed.

Judgment affirmed.

And thereby affirming the judgment of the court below in favor of said appellee, to which judgment and decision of the court the appellant, by his counsel, then and there excepted; and because the opinion and decision aforesaid do not fully appear of record, the defendant presents this his bill of exceptions, and prays that the same may be signed and sealed by the chief justice of this court and made part of the record herein, which is accordingly done.

88 Presented, signed, and sealed April 30th, 1881.

S. H. ELBERT, [SEAL.]

Chief Justice of the Supreme Court of the State of Colorado.

Endorsed as follows (marked E): No. 734. In Supreme Court. State of Colorado, appellee, vs. Henry C. Brown, appellant. Bill of exceptions. Filed in supreme court Aug. 30, 1881. Keyes Danforth, clerk. Browne & Putnam and James H. Brown, att'ys for appellant.

Precipe (marked G).

STATE OF COLORADO:

In supreme court, Denver, Colorado, Aug. 30th, 1881.

STATE OF COLORADO, APPELLEE,
vs. } No. 734.
HENRY C. BROWN, APPELLANT.

To Keyes Danforth, esq., clerk of said court:

You will please to make a copy of the record of the above cause, including the record as it came up on the appeal, the orders in the case, the bill of exceptions on writ of error to Supreme Court U. S., the assignment of errors, both on the appeal and on the writ of error to the Supreme Court of the United States, together with the original writ of error to U. S. Sup. C't, the citation, and a copy of the bond and the petition for the allowance of the writ of error, and all other papers, orders, &c., in the case, except the abstract of record and arguments of council.

JAMES H. BROWN,
Att'y for Henry C. Brown.

Endorsed as follows (marked G): No. 734. Henry C. Brown vs. State of Colorado. Filed in Supreme Court Sept. 3rd, 1881. Keyes Danforth, clerk. Precipe.

89 STATE OF COLORADO,
Supreme Court, ss:

I, Keyes Danforth, clerk of the supreme court of the State of Colorado, do hereby certify that the above and foregoing is a true and complete copy of the transcript of the record on appeal to this court from the district court of the first judicial district, in and for the county of Jefferson, and the assignment of errors thereon; the joinder in error; all orders in said cause in this court, including the opinion of the court filed herein, and the final judgment of said court; the appeal bond and approval thereof by the chief justice of said court; the assignment of errors to the Supreme Court of the United States, the bill of exceptions in said cause, and the precipe for this record, and now remaining on file in my office, together with the original petition for the allowance of the writ of error, the writ of error, and the citation and acknowledgement of service thereon.

In witness whereof I have hereunto affixed my hand and the seal of said court, at Denver, this 22nd day of October, A. D. 1881.

[SEAL.] KEYES DANFORTH,
Clerk Supreme Court of Colorado.
By JAMES A. MILLER,
Deputy.

90 Cost of transcript: 230 fol. at 20c. $46,00; certificate & seal, 1.00—$47.00. Paid by appellant, Henry C. Brown.

KEYES DANFORTH, *Clerk.*
By J. A. MILLER, *Deputy.*

Supreme Court of the United States.

HENRY C. BROWN, PLAINTIFF IN ERROR,
v.
STATE OF COLORADO, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October term, in the year of our Lord one thousand eight hundred and eighty-one, the said State of Colorado, by Charles H. Toll, attorney-general of the State of Colorado, and Henry M. Teller, its attorney, freely comes here into court and says that there is no error either in the record of the the proceedings aforesaid or in the giving of the judgment aforesaid, and it prays that the said supreme court of adjudicature, before the justices thereof now here may proceed to examine as well the record and proceedings aforesaid as
91 the matters aforesaid above assigned for error; and that the judgment aforesaid given may be in all things affirmed, etc.

CHARLES H. TOLL,
Att'y-Gen'l of Colorado.
HENRY M. TELLER,
Att'ys for Def't in Error.

(Indorsed:) Supreme Court U. S. 1881. October term. No. 954. Henry C. Brown, pl'ff in error, vs. The State of Colorado. Joinder in error. Filed 8th Oct. 1881.

(Stamp:) Office Supreme Court U. S. Filed Oct. 8, 1881. James H. McKenney, clerk.

(Also indorsed:) Supreme Court of U. S. Henry C. Brown, plaintiff in error, v. State of Colorado, defendant in error. Joinder in error. Charles H. Toll, att'y-gen'l of Colorado, Henry M. Teller, att'ys for def't in error.

(Indorsement on cover:) No. 612. Henry C. Brown, plaintiff in error, vs. The State of Colorado. Colorado, Supreme Court. Filed 6th October, 1881.

OFFICE SUPREME COURT, U. S.
FILED
SEP 23 1892
JAMES H. McKENNEY, CLK.

16-95

SUPREME COURT
OF THE
UNITED STATES.

HENRY C. BROWN,
Plaintiff in Error,
VS.
THE STATE OF COLORADO.
Defendant in Error.

MOTION TO DISMISS WRIT OF ERROR.

Brief of Defendant in Error.

CHARLES H. TOLL,
Attorney General,
AND
HENRY M. TELLER,
Of Counsel,
Attorneys for Defendant in Error.

SUPREME COURT

OF THE

UNITED STATES.

HENRY C. BROWN,
Plaintiff in Error,

vs.

THE STATE OF COLORADO,
Defendant in Error.

Motion to Dismiss Writ of Error.

Brief of Defendant in Error.

This case comes into this Court upon writ of error to the Supreme Court of the State of Colorado. The plaintiff in error seeks to reverse a final judgment of that Court rendered in April, A. D. 1881, affirming in all things a judgment rendered in April, 1880, by the District Court of that State, awarding to the defendant in error the possession of a parcel of land in the City of Denver, with damages against the plaintiff in error for withholding the same.

The right to a review in this Court is claimed under section 709 of the Revised Statutes of the United States.

The defendant in error insists that this case does not come within the scope of the section cited; that an examination of the record will not disclose any question to which its provisions are applicable, and that no such question was decided by the State Court, either expressly or by necessary implication. Upon the face of the record it is manifest that this Court is without jurisdiction.

STATEMENT OF CASE.

The subject of the action was a parcel of land containing ten acres, situate in the City of Denver, which was conveyed to the Territory of Colorado by the plaintiff in error by warranty deed in the usual form, bearing date January 11, 1868, and recorded the same day, containing a description of the said lands and the following recital:

"The said lands being so conveyed to said Territory in pursuance of the Act entitled 'An Act to locate the seat of government of the Territory of Colorado,' approved the ninth day of December, 1867, so as to vest the title to the same absolutely and in fee simple in said Territory for the purpose of erecting a capitol and other public buildings thereon, *only*."

LEGISLATION.

1. A history of all legislation of the Territory and the State Legislatures prior and subsequent to the conveyance mentioned, having any relation to the location of the capitol or the site for the capitol buildings, will be given, for upon such legislation, the questions of a Federal nature, if any there be, must arise, the decision of which by the State Court the plaintiff in error claims to be entitled to review.

2. The Act of Congress entitled, "An Act to provide a temporary government for the Territory of Colorado",

generally called, "The Organic Act" was approved February 28, 1861. Section 12 of that Act provides:

"That the Legislative Assembly of the Territory of Colorado shall hold its first session at such time and place in said Territory as the Governor thereof shall appoint and direct, and at said first session, or as soon thereafter as they shall deem expedient, the Governor and Legislative Assembly shall proceed to locate and establish the seat of government for such Territory at such place as they shall deem eligible, which place, however, shall thereafter be subject to change by the said Governor and Legislative Assembly".

3. Pursuant to the authority conferred by this section, the Territorial Legislature passed an act entitled, "An Act to locate the Seat of Government," which was approved November 5, 1861, locating the capitol within the surveyed limits of the Town of Colorado Springs in El Paso County. Subsequently the same legislative body passed an Act entitled, "An Act to repeal an Act entitled An Act to locate the Seat of Government of Colorado Territory and to locate the same," which was approved August 14, 1862. This Act located the capital at Golden City, on Clear Creek.

4. In the year 1867 the Legislature of the Territory passed an Act entitled, "An Act to locate the Seat of Government of the Territory of Colorado," which was approved on the ninth day of December of that year, and is as follows:

"*Be it enacted by the Council and House of Representatives of the Territory of Colorado:*

SECTION 1. That the seat of government of the territory of Colorado, shall be and the same is hereby located

and established at the City of Denver, in the county of Arapahoe, in said territory.

SEC. 2. That the Governor of the territory of Colorado, by and with the advice and consent of the legislative council of said territory, shall, at the present session of the legislative assembly, appoint three persons commissioners on behalf of the territory, to select a site, within the said City of Denver, for the capitol of said territory.

SEC. 3. The persons appointed, as aforesaid in section second of this act, shall, within sixty days after the date of their appointment, proceed to select a site for the capitol of said territory, within the said City of Denver, which site shall contain not less than ten acres of land, and if the site so selected shall be conveyed to the territory of Colorado, by the person or persons holding the title thereto, without charge to said territory and so as to vest the title to the same, absolutely and in fee simple, in said territory, the site, so selected, shall be and remain, the property of said territory, for the purpose of erecting a capitol, and other public buildings thereon.

SEC. 4. All acts, and parts of acts, inconsistent with this act, are hereby repealed.

SEC. 5. When this act shall be approved by the governor, and notice of such approval shall be received by the Branch of this legislative assembly, in which this act hath originated, this legislative assembly shall stand adjourned to meet in the said City of Denver, in the County of Arapahoe, at two o'clock in the afternoon of the day next succeeding the day of such approval."

5. It was immediately after the passage of this Act and pursuant to its provisions that the conveyance above mentioned was made by the plaintiff in error.

6. In February, 1872, the territorial legislature passed an Act entitled, "An Act to provide for the Erection of a Capitol Building", Section 5 of which provides that,

"Said building shall be erected upon the ground in the northwest quarter of the northeast quarter of section three (3), township four (4) south range sixty-eight (68) west, heretofore donated to the Territory for that purpose by Henry C. Brown."

7. Also an Act entitled, "An Act for the Appointment of Capitol Commissioners and Defining their Duties", approved February 13, 1874. This Act provided for the appointment of three commissioners whose duties should be,

"*First*—To examine into all the titles for lots and parcels of ground heretofore donated to the Territory of Colorado on condition that the Capitol be located at Denver, and if the same or any of them are found to be defective or imperfect in any particular, to have the same perfected to the Territory.

Second—To take and have control of all said Capitol site and Capitol fund property belonging to the Territory.

Third—To have the custody of and expend in the improvement of the Capitol Grounds, and in the erection of Capitol buildings thereon, any money that may be appropriated by the Territory, by the County of Arapahoe, or by the City of Denver, or that may be donated by any person or persons for that purpose.

Fourth—On and after the first (1st) day of April, A. D. 1875, they may sell at public auction, and convey the same, after advertising said lots and lands for thirty (30)

days in two (2) or more daily newspapers published in the City of Denver, and all of the lots and lands so donated and belonging to the Territory for Capitol purposes; except the Capitol Square, or site, itself—and shall then proceed to expend the money so realized in the erection of a Capitol building or buildings, upon said Capitol Square" * *

8. The foregoing is all the legislation enacted by the Legislature of the Territory of Colorado relating to the location and establishment of the seat of government of the Territory and the selection of a Capitol site and the erection of Capitol buildings.

9. In this connection attention is called to Sections 1850 and 1851 of the Revised Statutes of the United States.

"SEC. 1850. All laws passed by the legislative assembly and governor of any Territory, except in the Territories of Colorado, Dakota, Idaho, Montana and Wyoming, shall be submitted to Congress, and, if disapproved, shall be null and of no effect.

SEC. 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

10. The Constitution of the State of Colorado was adopted in 1876. SEC. 2 of ARTICLE VIII. provides that,

"The general assembly shall have no power to change or to locate the seat of government of the State, but shall at its first session subsequent to the year of our Lord one

thousand eight hundred and eighty, provide by law for submitting the question of the permanent location of the seat of government to the qualified electors of the State, at the general election then next ensuing, and a majority of all the votes upon said question cast at said election, shall be necessary to determine the location thereof; * * * provided that until the seat of government shall have been permanently located as herein provided, the temporary location thereof shall remain at the City of Denver."

SEC. 3 provides that,

"When the seat of government shall have been located as herein provided, the location thereof shall not thereafter be changed, except by a vote of two-thirds of all the qualified electors of the State" * * *

SEC. 4 provides that,

"The general assembly shall make no appropriation or expenditure for capitol buildings or grounds, until the seat of government shall have been permanently located, as herein provided."

11. The schedule annexed to the Constitution recites as follows:

"That no inconvenience may arise by reason of the change in the form of government, it is hereby ordained and declared:

SEC. 1. That all laws in force at the adoption of this Constitution shall, so far as not inconsistent therewith, remain of the same force as if this constitution had not been adopted, until they expire by their own limitation, or are altered or repealed by the general assembly. * * *

SEC. 3. That all property, real and personal, and all

moneys, credits, claims, and choses in action, belonging to the Territory of Colorado at the adoption of this Constitution, shall be vested in and become the property of the State of Colorado."

PLEADINGS.

1. The complaint contained two counts. As a first cause of action it was alleged that on the eleventh day of January, 1879, plaintiff was seised in fee of the land in controversy; that while the plaintiff was so seised, defendant afterward, about the ninth day of May, 1879, entered into possession of said land and wrongfully ousted plaintiff therefrom. That plaintiff is entitled to the possession, etc., proceeding in the usual form.

As a second cause of action it is alleged that on January 1st, 1879, plaintiff owned the land in controversy in fee simple and was in possession thereof. That while plaintiff was thus in possession of said land the defendant wrongfully intruded and entered thereon, etc., etc.

2. A demurrer was filed upon the grounds that complaint did not state facts sufficient to constitute a cause of action; that State cannot be disseised and cannot maintain ejectment or action provided for in Chapter XXIV. of the Code.

To the whole complaint that it is brought in the name of "The State of Colorado" instead of "The People," etc.

A misjoinder of causes of action, one in ejectment and the other intrusion.

3. Demurrer was overruled with leave to answer, etc., and the answer denied,

First, the ownership, seisin and possession by defend-

ant in error of said land or any part thereof at any and all times.

Second, plaintiff's estate therein.

EVIDENCE.

1. The evidence discloses the fact that after the deed of conveyance was made and recorded as above stated, the land in controversy was exempted from taxation and assessment and treated as public property in all respects, but it was not improved, nor were any buildings erected thereon.

2. May, 9, 1879, the plaintiff in error made and filed for record a paper which is called a "Deed of Revocation", containing among other things the following recital:

"And, Whereas, neither the said Territory nor its successor, the State of Colorado, have ever accepted the said conveyance, located and erected a Capitol and other public buildings on said tract of land as in and by said deed provided,

Now, Therefore, in consideration of the premises and of other good and sufficient cause, I, the said Henry C. Brown, have, and hereby do revoke, annul and declare and make void and of no effect the aforesaid conveyance, and all right, title and interest therein granted to the said then Territory of Colorado, its successors and assigns."

3. At about this time plaintiff in error entered upon the lands, erected a fence about them and exercised other acts of ownership, whereupon this action was brought.

JUDGMENT.

The judgment was in the usual form, awarding the possession of the land to the defendant in error, with damages, etc.

ASSIGNMENT OF ERRORS.

I. Upon a writ of error to the Supreme Court of the State of Colorado, the following were assigned as grounds of error:

The judgment in this case is erroneous, because,

1. The State cannot maintain a civil action in the nature of ejectment or the action provided for in the Code of that nature, to try title to land.

2. The plaintiff has no legal capacity to sue.

3. The Court erred in overruling the defendant's demurrer to plaintiff's complaint.

4. The Court erred in vacating the judgment of non-suit and granting a new trial on plaintiff's motion.

5. The Court erred in overruling the defendant's motion for a non-suit.

6. The Court erred in receiving in evidence on behalf of plaintiff the deed from defendant Brown to the Territory of Colorado.

7. The Court erred in refusing to allow defendant Brown to show that the consideration of one thousand dollars acknowledged as received in deed of defendant to the Territory of Colorado was other than actual money.

8. The finding of the Court is against the evidence.

9. The finding of the Court is against the law.

10. The judgment of the Court is for the plaintiff instead of for the defendant.

11. The finding is against the weight of evidence.

II. Of these eleven assigned errors, it is only necessary to call attention particularly to the sixth. The follow-

ing objections were made when the deed mentioned therein was offered in evidence:

"That the Territory of Colorado had no right to take a conveyance for real estate at the time of the making of the deed without the consent of the government of the United States for any purpose, and further because the land described in the deed is shown by the deed itself to be without the City of Denver, outside of it and beyond the city limits.

Because the deed shows on its face that it was made in pursuance of an Act of the Territorial Legislature of the ninth of December, 1867, entitled, 'An Act to Locate the Seat of Government of the Territory of Colorado,' found on page 90 of the Revised Statutes, and further, because the Act to locate the seat of government was repealed by Article VIII., Sections 2, 3 and 4, of the constitution of the State of Colorado, and further, because the Territory of Colorado, being the donee, could alone perform the condition in the deed, the deed being upon condition."

OPINION.

Of the opinion of the Supreme Court, which comes up with the record, it is but necessary to say that there is nothing in it to indicate that any Federal question was decided by that Court. There is no discussion of nor allusion to any such question.

POINTS AND AUTHORITIES.

The record is largely set forth in the foregoing statement of the case, in order that it may be at once clearly seen that no question arises therein which this Court will review.

No extended argument is requisite to show that it is necessary in these cases that the record should be so framed as to show, either by express words or necessary legal intendment, that one of the questions which the Supreme Court is, by the statute, authorized to review, was befoe the State Court and was decided by it. Imperfect knowledge of the limited jurisdiction conferred upon and exercised by this Court upon review of the judgments of the Courts of the States, has lead litigants to bring many cases into this Court, of which it had no jurisdiction, and, therefore, a great number of cases which have been dismissed appear in the reports of the decisions of this Court, in which the rule above set forth, and the general rules applicable to cases of this nature, are comprehensively stated. But a few of these cases will be cited.

In the case of Crowell vs. Randell (10 Peters, 368), after a review of every case down to that time in which that question was involved, Story, J., states the proposition to be deduced from all the cases as follows: "Under the "25th section of the Judiciary Act (1 State at Large, 85) "it must appear. 1. That some one of the questions stated "in that section did arise in the State Court. 2. That the "question was decided by the State Court as required in "the said section. 3. It is sufficient if it appear by clear "and necessary intendment from the record, that the ques- "tion must have been raised and decided; it need not appear "in terms. 4. It is not sufficient that a question might "have arisen or been applicable; it must appear it did arise "and was applied."

In Armstrong vs. Peters (16 Peters, 281) it is held that, "To give this Court jurisdiction under the 25th sec- "tion of the Judiciary Act, it must appear on the record "itself to be one of the cases enumerated in that section,

"and nothing outside of the record certified to this Court "can be considered."

In Gibson vs. Chouteau (8 Wallace, 314) it is held:

1. It is necessary to the jurisdiction of this Court, under the 25th section of the Judiciary Act, that the *record* show, either by express words or necessary legal intendment, that one of the questions mentioned in that section was before the State Court, and was *decided* by it.

2. Neither the argument of counsel nor the opinion of the court below can be looked to for this purpose.

3. When there are other questions in the record on which the judgment of the State Court might have rested, independently of the Federal question, this Court cannot reverse the judgment.

II.

The only evidence of title offered by the defendant in error to the land was the deed of conveyance, made by the plaintiff in error, as above stated. The conveyance is in the usual form, except that authority pursuant to which it is made, the nature of the estate which the grantor designed to convey, and the purpose to which the land is to be devoted, are all set out.

That the attention of the Court may be called particularly to the question under discussion the precise language used by the grantor (plaintiff in error) is again quoted: "The said land being so conveyed to said Territory in pur-"suance of the act entitled an Act to locate the seat of "government of the Territory of Colorado, approved the "9th day of December, A. D. 1867, so as to vest the title "of the same absolutely and in fee simple in said Territory,

"for the purpose of erecting a Capitol and other public "buildings thereon, only."

When the deed was offered to be read in evidence, on the trial certain objections were urged to its admissibility, which were overruled. This deed with the so-called "deed of revocation" constituted the entire case of the plaintiff upon the trial in the court below. No objection was made to the deed of revocation. It must, therefore, necessarily follow, that if there is a question of a Federal nature which this Court is authorized to revise, it must arise upon the ruling of the State Court upon objections made to the deed, for it was then only that the validity of the legislation either of the Territory, the State or the United States was questioned.

The section of the Revised Statutes of the United States under which this review is sought confers appellate jurisdiction in this Court from final judgments and decrees in any suit in the highest court of law or equity of a State in which a decision in the suit could be had in three classes of cases.

Firstly—When is drawn in question the validity of a treaty of, or statute of, or an authority exercised under the United States, and the decision is against their validity.

Secondly—When is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of such their validity.

Thirdly—When is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under the United States, and the deci-

sion is against the title, right, privilege or exemption specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission.

Extricate the objections mentioned from the confusion of statement in which they are involved as far as possible, and examine each one of them specifically and in detail in the light of these provisions, and it will be at once apparent that this case does not come within the revising power of this Court.

The first ground of objection is stated in the following language:

"That the Territory of Colorado had no right to take "a conveyance for real estate, at the time of the making of "the deed, without the consent of the government of the "United States, for any purpose."

If the validity of a treaty or statute of, or an authority exercised under the United States, is here drawn in question, it does not appear that the decision was against their validity, which, it is hardly necessary to say, must appear or this case does not come within the first class of cases provided for by this section. But as the authority pursuant to which it was made appeared upon the face of the instrument itself, to which the objection was being urged, it may be that it was intended to question the validity of the act of the Territorial Legislature to which reference is made in the deed. If this was the intention, it would be no aid to the jurisdiction.

"Under the 25th section of the judiciary act of 1879, "this Court cannot re-examine the decision of a State court "that a law of a territory was not repugnant to the consti- "tion of the United States.

"Though by the fundamental law of a Territory its "legislation is to be subject to the disapproval of Congress, "yet till disapproved it is valid and operative; it does not "owe its effect to the action of Congress thereon, so as to "become an act of Congress."

Union Bank of Dubuque vs. The State of Iowa (12 Howard, 1).

"A certificate from the Supreme Court of Iowa (lately "a Territory), that in a case brought here from its final "judgment the validity of the Partition Law of Iowa *Terri-* "*tory*, approved January 4th, 1839, was drawn in question "on the ground that the same was in conflict with the ordi- "nance of 1787, the Constitution of the United States, the "treaties and laws thereof, the objections thereto overruled, "and the statute held to be valid against the rights and in- "terests of the defendants as claimed by them, presents the "constitutional objection in too general a form to give this "Court jurisdiction under the 25th section of the judiciary "act.

"2. That section does not apply to the case when is "drawn in question the validity of a statute of a Territory."

Messenger vs. Mason (10 Wallace, 507).

The second objection is as follows:

"And further, because the land described in the deed "is shown by the deed itself to be without the city of Den- "ver, outside of it, beyond the city limits."

Clearly no Federal question was involved in the ruling of the Court below upon this objection.

The following is the language of the third objection:

"Because the deed shows on its face that it was made

"in pursuance of an act of the Territorial Legislature of the "9th of December, 1867, entitled, 'An act to locate the seat " 'of government of the Territory of Colorado,' found on "page 90 of the Revised Statutes."

If by this objection it was sought to draw in question the validity of the legislative act mentioned, the authorities above cited are sufficient to show that no question can arise upon the ruling which can be reviewed here. This objection is, however, unintelligible in the form in which it appears upon the record, and should probably be read in connection with the fourth objection, which is as follows:

"And further, because the act to locate the seat of gov- "ernment was repealed by Article VIII., Sections 2, 3 and "4, of the Constitution of the State of Colorado."

Clearly the only question arising upon this objection is one of construction. It is not claimed that the sections of Article VIII. cited are invalid as being repugnant to the Constitution of the United States.

" When it appears that the judgment of the State court "involved only the construction of State statutes admitted "to be valid, this Court has no jurisdiction.

" If the subject of complaint be that a State statute is "repugnant to the constitution of the United States, and "therefore void, and that the State court has declared it to "be void, this fact should appear by some direct averment, "either on the bill or answer, or in the decree of the court."

Michigan Central R. R. Co. vs. Michigan Southern R. R. Co. (19 Howard, 378.)

In Withers vs. Buckley (20 Howard, 84) the following language occurs:

"Thus it is charged in the complainant's bill that the "law authorizng the improvement of the Homochitto river "is void, because it violates the constitution of Mississippi "by omitting to provide a compensation for the injury which "might be done to individuals by carrying that law into "effect, the constitution of the State having declared that "private property shall not be taken for public use without "just compensation being made therefor. In answer to this "charge, it is sufficient to state that this Court never has and "does not assume the right to pronounce authoritatively "upon the wisdom or justice of the legislation of the States "when operating upon their own citizens and upon subjects "of property clearly within their own territory and appro- "priate cognizance, except so far as the constitution of the "United States expressly or by inevitable implication may "have made it the duty of this Court to control the action of "the State government. Nor has it been deemed the prov- "ince of this Court to abrogate or overrule the interpreta- "tion put upon their own respective statutes by the courts "of the several States, whether such interpretation had refer- "ence to the ordinary rights of persons and property, or to "the nature and extent of the legislative powers vested by "the constitutions of the several States, and their coinci- "dence with acts of legislation performed under the delega- "tion of these powers. These are functions wisely and nec- "essarily left by this Court untouched in the State tribu- "nals, the assumption of which by the Federal judiciary, as "it would embrace every matter upon which the government "of the State could operate, would, in effect, amount to the "annihilation of those governments. The doctrine of this "Court as here stated has been clearly affirmed."

Medberry et al. vs. The State of Ohio (24 Howard, 413).

Peters vs. Foley (Id., 415).

"When the plaintiff in a writ of error to a State Court "claims adversely to an act of Congress, and denies its vali- "dity, this Court has no jurisdiction to revise the decision "of the State Court as to the validity of a sale of lands "under the Statute of the State."

Congdon et al. vs. Goodman et al. (2 Black, 574).

In Lawler vs. Walker (14 Howard, 149), it is stated that: "The conflict of a State law with the constitution of the "United States, and a decision by a State Court in favor of "its validity, must appear on the face of the record, before it "can be re-examined in this Court. It must appear in the "pleadings of the suit, or from the evidence in the course of "trial, in the instructions asked for, or from exceptions "taken to the ruling of the Court. It must be that such a "question was necessarily involved in the decision, and that "the State Court would not have given a judgment without "deciding it. * * * * * * * *

"And it was also in this view, where one State statute "was said to be repugnant to another, both being admitted "to be constitutional, that it was said in that case, 'it is the "'peculiar province and privilege of the State Courts to "'construe their own statutes'; and when they did so, 'it "'was no part of the functions of this Court to review their "'decisions', or, in such cases, 'to assume jurisdiction over "'them on the pretence that their judgments have impaired "'the obligation of contracts.'

"In cases depending on the statute of a State, and es- "pecially concerning land, the settled construction of their "statutes by the State Courts is to be adopted."

Polks Lessee vs. Wendal (9 Cranch, 87).

Robertson, Trustee of Commercial Bank, etc. vs. Coulter et al. Executor, etc. (16 Howard, 106).

Commercial Bank of Cincinnati vs. Buckingham (5 Howard, 317).

Section 1 of the schedule of the constitution of the State of Colorado provides: "That all laws in force at the "adoption of the constitution shall so far as not inconsistent "therewith remain of the same force as if the constitution "had not been adopted, until they expire by their own lim- "itation, or are altered or repealed by the General As- "sembly." * * * * * * *

In the light of the authorities above cited, can anything be more clear than this—that the question as to whether the legislative enactment of the Territorial government, pursuant to which the plaintiff in error conveyed the land in controversy, was repealed by Sections 2, 3 and 4 of Article VIII of the constitution of the State of Colorado, or is inconsistent therewith, is one the determination of which is peculiarly within the province of the judicial tribunals of the State.

III.

Upon the face of the writ of error there appears the broad statement that there "was drawn in question the "validity of an act by the Senate and House of Repre- "sentatives of the United States in Congress assembled "entitled, 'An act to provide a temporary government for "the Territory of Colorado,' approved February 28, 1861, "and an act of the Council and House of Representatives "of the Territory of Colorado entitled, an 'Act to locate "the seat of government of the Territory of Colorado,' ap- "proved December 9th, A. D. 1869, and also sections two

"(2), three (3) and four (4) of Article eight (VIII.), and sec-
"tion three (3) of the schedule of the constitution of the
"said State of Colorado, on the ground of their being re-
"pugnant to the constitution of the United States, and the
"decision was in favor of such their validity."

A careful examination of the record and of every alleged error which appears therein has failed to disclose that any constitutional question whatever was raised.

It may have been the intention of the plaintiff in error to raise all the Federal questions mentioned in the writ, but "the intention of the parties to raise a constitutional ques-
"tion is not enough; it must be actually raised and de-
"cided."

> Matheson vs. Branch Bank of Mobile (7 Howard, 260).

The writ of error should be dismissed for want of jurisdiction.

CHARLES H. TOLL,
Attorney General of the State of Colorado.

HENRY M. TELLER,
Of Counsel,
Attorneys for the Defendant in Error.

OFFICE SUPREME COURT U. S.
FILED
SEP 11 1882
JAMES H. McKENNEY, Clerk.

Mo to advance

16-95

SUPREME COURT

OF THE

UNITED STATES.

HENRY C. BROWN,
Plaintiff in Error,

vs.

THE STATE OF COLORADO.
Defendant in Error.

Petition and Notice of Motion.

CHARLES H. TOLL,
Attorney General,
AND
HENRY M. TELLER,
Of Counsel,
Attorneys for Defendant in Error.

SUPREME COURT

SUPREME COURT

OF THE

UNITED STATES.

HENRY C. BROWN,
Plaintiff in Error,

vs.

THE STATE OF COLORADO,
Defendant in Error.

To the Honorable the Supreme Court of the United States:

Charles H. Toll, as Attorney General of the State of Colorado, brings this petition in behalf of the above named defendant in error, and respectfully shows;

That the above entitled cause is between the State of Colorado and a citizen thereof; and is now pending and is docketed in your Honorable Court, having been brought thereto upon a writ of error from the Supreme Court of the State of Colorado.

That said cause involves the title to a tract of land selected by the Commissioners of the late Territory of

Colorado as a site for the Capitol of said Territory, and situate at the City of Denver in said State.

That said tract, in pursuance of the selection thereof by said Commissioners, was on the eleventh day of January, 1868, conveyed to said Territory of Colorado by Henry C. Brown, the present plaintiff in error, by a full warranty deed, so as to vest the title to the same absolutely in said Territory, for the purpose of erecting a Capitol and other public buildings thereon, as was in said deed recited.

That the State of Colorado, as the successor of said Territory, now holds the title to said tract of land and Capitol site, and is entitled to the possession thereof.

That it is the intention of said State to use and occupy the same as a site for the Capitol of said State, should the title of the State thereto be confirmed by your Honorable Court.

That the Third General Assembly of the State of Colorado, by an act duly approved on the 11th day of February, A. D. 1881, and which act is printed on pages 43, 44 and 45 of the Session Laws of the State of Colorado, for the year 1881, appropriated and set apart the sum of five thousand dollars for the purpose of grading, fencing and otherwise improving said State Capitol site, upon the decision of the Supreme Court of said State in the above cause then pending in said Court, determining the title of said land to be in the State of Colorado, and upon the written certificate of the Attorney General of said State that the said title is so vested in said State and is unimpeachable.

That at the general election held in said State in November, A. D. 1881, pursuant to the provisions of the Constitution of Colorado, it was duly determined by the electors of said State that the Capitol of the State of Colorado

and the permanent location of the seat of government of said State should be at said City of Denver.

That as your petitioner is informed and believes, it is the purpose and earnest desire of the prople of said State and of the government thereof, that the improvement of said Capitol site and the construction of a Capitol building thereon, shall commence at as early a period as possible.

That until the above entitled cause is determined by your Honorable Court no action can safely be taken by the State in improving said Capitol site or constructing Capitol buildings thereon, and that it is desirable and for the interests of the State of Colorado that said cause should be advanced, and determined by your Honorable Court at as early a day as may be practicable.

Wherefore your petitioner respectfully asks that said cause may be advanced upon the docket, and some early day of the ensuing term may be set for hearing said cause. And your petitioner will ever pray, etc.

CHARLES H. TOLL,

Attorney General of the State of Colorado.

SUPREME COURT

OF THE

UNITED STATES.

HENRY C. BROWN,
Plaintiff in Error,

vs.

THE STATE OF COLORADO,
Defendant in Error.

SIRS:

Please take notice that upon the petition hereto annexed, with a copy of which you are herewith served, a motion will be made before the Honorable the Supreme Court of the United States, at the court room of said Court, in the City of Washington, D. C., on Monday the 9th day of October, A. D. 1882, or as soon thereafter as counsel can be heard, for an order in accordance with the prayer of said petition.

Yours, etc.,

CHARLES H. TOLL,
Attorney General of the State of Colorado.

HENRY M. TELLER,
Of Counsel,
Atttorneys for the Defendant in Error.

To HENRY C. BROWN, ESQ., *Plaintiff in Error, and* JAMES H. BROWN *and* CHARLES CASE, *Attorneys for Plaintiff in Error.*

SUPREME COURT

OF THE

UNITED STATES.

HENRY C. BROWN,
Plaintiff in Error,

vs.

THE STATE OF COLORADO,
Defendant in Error

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO. } ss,

ALBERT C. KOOGLE, being duly sworn upon his oath, says that he is a Deputy United States Marshal for the District of Colorado; that on the fourth day of September, 1882, at the City of Denver, in said District, he personally served the foregoing petition and the notice thereto annexed upon JAMES H. BROWN, one of the within named attorneys for the plaintiff in error, personally, by delivering to and leaving with said JAMES H. BROWN a true copy of said petition and of said notice.

ALBERT C. KOOGLE.

Subscribed and sworn to before me this fifth day of September, A. D. 1882.

EDWARD F. BISHOP,
[SEAL] *Clerk Dist. Ct. U. S.*
By WM. E. ROGERS,
Deputy.

SUPREME COURT

OF THE

UNITED STATES.

HENRY C. BROWN,
Plaintiff in Error,

vs.

THE STATE OF COLORADO,
Defendant in Error.

NOTICE OF MOTION.

SIRS:

Please to take notice that upon the record and proceedings heretofore had herein, the statement of facts hereinafter set forth, and the brief with a copy of which you are herewith served, a motion will be made before the Honorable the Supreme Court of the United States, at the court room of said Court, in the City of Washington, D. C., on Monday, the 9th day of October, A. D. 1882, or as soon thereafter as counsel can be heard, for an order dismissing the writ of error heretofore granted herein and directed to the Supreme Court of the State of Colorado, for the reason that this Court hath not jurisdiction of this cause, because it is

sought to review a final judgment of said Supreme Court of the State of Colorado, the highest Court of that State in which a decision could be had, rendered in a suit between the State and a citizen thereof, and it doth not appear that there was drawn in question the validity of a treaty, a statute of, or an authority exercised under the United States, and the decision was against their validity, or the validity of a statute, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of their validity, or any title, right, privilege, or immunity claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States; and the decision was against the title, right, privilege and immunity, specially set up or claimed by either party, under such constitution, treaty, statute, commission or authority.

STATEMENT OF FACTS.

The record is very brief. In compliance with the authority conferred upon the Governor and legislative assembly of the Territory of Colorado by the act of Congress creating a temporary government therefor, in the year 1867 that legislative body passed an act entitled, "An Act to Locate the Seat of Government of the Territory of Colorado," approved December 9th, of that year, locating the seat of government at the City of Denver, and providing for the appointment of commissioners to select a site within said City for the capitol building, which should contain at least ten acres of land, and which further provided that, if the land so selected "shall be conveyed to the Territory "of Colorado by the person or persons holding the title

"thereto without charge to the said Territory, and so as "to vest the title to the same absolutely and in fee simple "in said Territory, the site so selected shall be and re- "main the property of said Territory for the purpose of "erecting a capitol and other public buildings thereon."

Pursuant to this act the plaintiff in error conveyed the land in controversy to the Territory of Colorado by warranty deed in the usual form, referring in the deed to the act above cited, and declaring the land to be so conveyed, "so as to vest the title to the same absolutely and "in fee simple in said Territory for the purpose of erecting "a capitol or other buildings thereon" only. From the date of said conveyance to the present the land so conveyed has been exempted from taxation and assessment and treated in all respects as public property, but it has not been improved and no buildings have been erected thereon.

May 9th, 1879, the plaintiff in error made and filed for record a paper which is called a "Deed of Revocation," containing the following recital:

"And whereas, neither the said Territory nor its suc- "cessor, the State of Colorado, have ever accepted the said "conveyance, located and erected a Capitol and other pub- "lic buildings thereon as in and by said deed provided,

"Now therefore, in consideration of the premises and "of other good and sufficient cause, I, the said Henry C. "Brown, have and hereby do revoke, annul, and declare "and make void and of no effect the aforesaid conveyance, "and all right, title and interest therein granted to the said "then Territory of Colorado, its successors and assigns."

At about this time the plaintiff in error erected a fence about the premises and exercised other acts of ownership, whereupon the defendant in error sued in ejectment

and for intrusion, upon which issue was joined and a trial had, which resulted in the rendition of a judgment in the ordinary form, awarding the possession of the land to the defendant in error with damages, etc., which judgment was affirmed in all things by the Supreme Court of the State of Colorado.

Reference is made to the printed brief served herewith for a more complete statement.

Yours, etc.,

CHARLES H. TOLL,
Attorney General of the State of Colorado.

HENRY M. TELLER,
Of Counsel,
Attorneys for the Defendant in Error.

To HENRY C. BROWN, ESQ., *Plaintiff in Error, and* JAMES H. BROWN *and* CHARLES CASE, *Attorneys for Plaintiff in Error.*

SUPREME COURT

OF THE

UNITED STATES.

HENRY C. BROWN,
Plaintiff in Error,

vs.

THE STATE OF COLORADO,
Defendant in Error.

UNITED STATES OF AMERICA,
DISTRICT OF COLORADO. } ss.

CHARLES H. ADAMS, being duly sworn on his oath says that he is a citizen of the State of Colorado and of full age; that on on the 18th day of September, 1882, at the City of Denver, in said District, he personally served the foregoing notice and the brief thereto annexed upon JAMES H. BROWN, one of the within named attorneys for the plaintiff in error, personally, by delivering to and leaving with said JAMES H. BROWN, true copies of said notice and brief.

CHARLES H. ADAMS,

Subscribed and sworn to before me this 18th day of September, A. D. 1882.

EDWARD F. BISHOP,

[SEAL] *Clerk Dist. Ct. U. S.*

By WM. E. ROGERS,
Deputy.

OFFICE SUPREME COURT U. S.
OCT 30 1882
JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 612.

HENRY C. BROWN, Plaintiff in Error,

vs.

THE STATE OF COLORADO.

Error to the Supreme Court of the State of Colorado.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Brief in Opposition to said Motion, by

CHARLES CASE,
Of Counsel for Plaintiff in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1882.

HENRY C. BROWN, PLAINTIFF IN ERROR,

vs.

THE STATE OF COLORADO.

No. 612.

ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

Motion to Dismiss for Want of Jurisdiction.

Brief in Opposition to said Motion, by Charles Case, of Counsel for Plaintiff in Error.

Preliminary to the argument here to be submitted, the writer deems it both fair and proper to state that the more elaborate brief of twenty-five pages, filed concurrently with this, and to which are appended, as attorneys for plaintiff in error, the names of the writer and James H. Brown, was wholly prepared by the latter gentleman. And this is said because, possibly, on turning over its pages, honor-

able judges may feel that it quotes at unnecessary length, and beyond what is approved as the better practice, the decisions of this court. The writer quite vividly remembers that for this fault he was once very pointedly but justly rebuked by one of its honorable justices, who closed with the remark that "courts were presumed to be familiar with their own decisions."

If, then, this brief of associate counsel shall appear open to the criticism intimated, pray let it be borne in mind, as sufficient apology and vindication, that, being yet young in years, he is of course young in professional experience, while his practice in this court begins with the case at bar.

This said, it remains that the *argument* needs no apology. On the contrary, it is so full and clear that there seems to be no pressing necessity for adding a single word to its well-reasoned, thoroughly-fortified conclusions.

The present labor, therefore, as now purposed, will be little else than an attempt to bring out somewhat more sharply one or two of the points made in that brief; possibly nothing more than this.

In this connection, to guard against any inference of distrust of or want of interest in the cause, a further brief explanation may be timely.

When this motion was called up on the first day of the term, it was remarked to the court that, as counsel for plaintiff in error then understood the case, a thorough discussion of the motion would be equivalent to full argument on the merits; but, even if that were true, it was not certain that, on behalf of plaintiff in error, oral argument would be desired. The record had not then been printed, and for that and other reasons it had not then been critically read. And so it was that up to that period, with only general and somewhat vague ideas of what questions were or might be involved, counsel had misgivings as to jurisdiction even, as well as in regard to the merits, as has

been frankly confessed. Since then the case has been as carefully studied, as thoughtfully considered, as was possible with the scant time that could be given to the work. The result is that all these doubts have disappeared, and instead thereof has come the abiding conviction, not only that plaintiff in error has rightfully come here with his cause, but that "he has come to stay;" that he legally claims the jurisdiction of this honorable court, and, in due time, may as legally ask the reversal of the judgment rendered in the court below. At the same time comes also the conviction that the case is one worthy of and requiring the amplest discussion, both oral and on paper;—one that should not be finally disposed of on such hastily-prepared briefs as only are possible here and now.

But, dropping explanatory remarks, already so extended as to deserve censure, we proceed to the material work in hand.

This motion to dismiss is grounded upon the theory that the case does not disclose a material "Federal question" involved and decided adversely to plaintiff in error in the court below. If the honorable Attorney-General fails to make good this proposition, his motion must be denied.

In discussing it, the first query to be correctly answered is, "How shall it be made to appear that such Federal question was involved and ruled against the plaintiff in error in the lower court?" And it is in dealing with this that the Attorney-General makes the one sweeping mistake fatal to his entire argument—a mistake, too, as surprising as fatal.

The law must answer the query. And for the law applicable he relies solely upon the original judiciary act (1 Stat. at Large, p. 85, sec. 25) and the decisions of this court made under that section, or as the law stood prior to the Federal legislation of 1867. He cites no other authorities, entirely omitting and apparently ignoring more recent adjudications, especially the leading one in *Murdock*

v. *Memphis*, 20 Wall., 590, in which Mr. Justice Miller, speaking for a majority of the court, in an exhaustive opinion reviews all legislation and all decisions pertinent, and finally clearly defines the present *status* of the law. Overlooking this case and taking earlier ones for his guide, the Attorney-General asserts, (as indeed he must to sustain his motion,) on page 13 of his brief, that reference cannot be had to the opinion of the court below to ascertain whether or not a Federal question did there arise and was there ruled adversely to plaintiff in error.

Subsequent decisions of this court need not be mentioned, for they are in harmony with *Murdock* v. *Memphis;* and it is upon that one feature of the latter case, which in effect *does* decide that the opinion of the court below may be used here for determining the question of jurisdiction, that a suggestion or two is offered; and this because the case at bar is one of a class quite likely from its nature to emphasize the soundness of this ruling.

After mentioning the omission in the new statute of the restriction contained in the act of 1789, the judge says: "We see no reason why, since this restriction is removed, we should not so far examine these opinions, [of the lower courts,] when properly authenticated, as may be useful in determining that question"—jurisdiction. Exactly so. Most appropriate is the old maxim, "*Cessante ratione, cessat et ipsa lex.*" It might have been added that cases may arise where, from the opinion better than elsewhere can it be ascertained what the legal question in contention was, and that is more likely to be true of ejectment suits (such as this is) than of any other class. Of all common-law forms of action perhaps the pleadings in ejectment come nearest to absolute silence as to the real legal issue involved.

Nevertheless, it is not necessary to assume in the present case that the opinion below furnishes the sole evidence of a Federal question there, so raised and decided as

to confer jurisdiction here. Plaintiff in error insists, rather, that several such questions were there in issue and ruled against him, as by the record is sufficiently manifest; but it is asserted as to one of these questions—the one intended to be chiefly if not solely considered in this brief, and possibly not the least important of all—that if otherwise it is not clearly brought out, the opinion shows that it *was* there, as well as the decision thereon, past all reasonable disputation; and this opinion is not only "properly authenticated," as is usual, but it is also here as part of a bill of exceptions in the case. (R., pp. 36 to 42, inclusive.)

If, now, the attempt to separate from overlying and surrounding debris and bring to the surface the one jurisdictional question selected for the purposes of this argument shall prove a circuitous process, wordy to weariness, it will only confirm a former statement, that this case should not be thrust aside upon any such hasty discussion as is here only possible.

The following positions are assumed and discussed as fully warranted by the record:

I.

The land in dispute was conveyed by Brown, plaintiff in error, for a specific use, *and for no other*. This use was quite clearly indicated by the terms of the territorial act inviting the donation. The language there employed is: "For the purpose of erecting a capitol *and* other public buildings thereon." (See sec. 3 of the Act, correctly quoted in brief of Attorney-General on p. 4.) The deed made by Brown is still more explicit, the limitation as to use being therein expressed thus: "For the purpose of erecting a capitol and other public buildings thereon ONLY."

Thus there would seem to be no room for doubt or controversy as to the right to use intended to be granted, and

the consequent restricted right to hold and enjoy intended to be vested in the donee. True, it was argued below that the word "*only*" was, as against the Territory, and consequently as against the State, *ultra vires* and of no effect, because the designated Territorial Commissioners were not authorized to accept a conveyance thus limiting the use! Whether they were in fact thus empowered need not now be considered. It suffices that they did accept such a grant, or none, for thus only did Brown convey. If they did not accept, there ends the contention, and Brown holds the land. This was a voluntary, not a forced transaction; and surely it need not be seriously argued that Brown, as owner, and acting of his own volition, could part with his own upon such terms and prescribed conditions as he saw fit, or not part with it at all. The territorial statute could not and did not abridge this incident of ownership. Said the great Nazarene, nineteen hundred years ago, "Is it not lawful for me to do as I will with mine own?" And from that day to this in no civilized land has this law of property been questioned.

To put it in briefest English, Brown granted the use of the ten acres "for a capitol building," &c., and subject to certain conditions soon to be mentioned, forever; but he did not grant the right to use it for any other purpose for a single hour.

II.

Such being the express condition, what is to be presumed, as to time of acceptance and use as prescribed, of the thing granted?

For the proper answer to this question several facts, either apparent or presumable from the record, must be considered; as, for example—

1st. From the very description of the land as written in the deed it is a fair presumption, a strong one, in fact,

that the ten acres were but a fractional part of a larger tract (at least 40 acres) then owned by the grantor. It must suffice to state this proposition, referring to the deed, (R., p. 19,) for a diagram is essential to its clear illustration. That would show that the land conveyed was taken from the interior of a legal subdivision of a section no where touching its boundary-lines. It may be added that other parts of the record give force to the presumption, while, for present purposes, a presumption is sufficient, there being no proof to the contrary.

2d. The conveyance was evidently a gift, a donation. We do not overlook the fact that a consideration of $1,000 is stated, nor forget that in the lower court an offer to prove the real or an additional consideration was rejected, as we think erroneously, inasmuch as the object was not to defeat the conveyance, or vary its effect, in the legal acceptation of those phrases, but to give it effect according to the true intent of parties. Indeed, the proof thus excluded might have been potent in making clearer the contract-rights of plaintiff in error, which, as now claimed, were denied him in contravention of the Federal Constitution. Be that as it may, it is still true, as was said by an able lawyer, "Rules of evidence can neither weaken the force of logic nor forbid its exercise." So, here, we say that from all the circumstances as disclosed by the record, it is a mockery of reason to assert that the $1,000 was the potent motive for the grant, even if that sum was in fact paid. In the light of these circumstances, $1,000 was a mere bagatelle. The land was, presumably at least, in a city—a city destined, as was believed, to become the permanent capital of a State. It was set apart for the capitol building; and if, prior to such designated use, it was worth ten cents per square foot, such designation and use would enhance its value five-fold or more, because it could not be priced at less than the value which would thus be imparted

to adjoining realty. This is simply the voice of Common Sense, testifying as an expert upon the facts as they still appear in the record, and as much evidence as though it were the sworn statement of a living witness.

Thus, notwithstanding direct proof to the point was excluded, the conclusion is irresistible that the conveyance was substantially a donation, the real inducement for which was *the profits to accrue* from the enhanced value of adjoining lands, certainly to be realized, provided the designated use became a fixed fact within reasonable time. Of course the enhanced value would result whenever the use became a certainty; but if there was unreasonable delay, such enhancement might net small profits, or none, or even a loss.

These considerations and positions, all legitimately deducible, as we respectfully submit, from the record, furnish a legal anwser to the question (II) above propounded.

By a fair and warrantable construction of his grant plaintiff in error had a right to such immediate acceptance and use (the use proving acceptance) of the site as was compatible with the inherent impotency of the territorial authority; and to insist that, immediately upon the termination of that impotent condition, that is, as soon as the Territory became a State, she should unconditionally accept and, as speedily as practicable, occupy the premises as prescribed. Especially had he the right, by the implied terms of his grant, to demand that, after the lapse of eight years, (from 1868 to 1876,) the State should do no act implying possible if not probable abandonment of the land as a site for a capitol building, and, at best, a further certain postponement of the designated use for four, perhaps five years. The State had no right thus to claim title to the land and yet postpone for years, *if not forever*, all benefits anticipated by plaintiff in error, the very benefits, prospect of which induced him to make the deed.

Claiming the foregoing to be the true and legal theory deducible from the record, we thus show how in one instance (not to mention others) the State of Colorado violated her express and implied contract-obligations to plaintiff in error, and gave him the right to revoke his grant and reclaim the land it covered.

To complete the argument, it is but essential to remind this court that, from the opinion rendered in the court below, it is made manifest that as to these alleged contract-rights of plaintiff in error the ruling was adverse to him, and was decisive of the case. (See Opinion in Record, pp. 40 to 42.)

True, that court assumed that the grant *was* conditional, as plaintiff in error claimed; but, assuming this, it was held that there had been no breach, because the State, in the matter of building, had good right to go slow. As stated in another brief, this was but deciding a question not in issue.

We can conjecture, too, what may be said as to the delay of plaintiff in error to make manifest his revocation. On final hearing we shall be prepared to meet that criticism, and, we hope, all others. Surely we need not now further extend an argument which really goes to the merits.

CHARLES CASE,
Of Counsel for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

HENRY C. BROWN,
Plaintiff in Error,
vs.
THE STATE OF COLORADO,
Defendant in Error.

Motion to Dismiss Writ of Error.

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

The "statement of case" and of legislation set forth in brief of defendant in error is substantially correct.

Nevertheless, the plaintiff in error prefers to make his own statement of case and of legislation in such a manner, if he can, as will clearly present his views as to the jurisdiction of this tribunal over this cause.

This action concerns the title to a parcel of land now situated in the city of Denver, State of Colorado, which was donated to the Territory of Colorado by the plaintiff in error by his deed bearing date January 11, 1868.

The deed contains, after the description of the land, the following recital:

"The said lands being so conveyed to said Territory, in pursuance of the act entitled 'An act to locate the seat of government of the Territory of Colorado,' approved the 9th day of December, 1867, so as to vest the title to the same absolutely and in fee simple in said Territory, for the purpose of erecting a capitol and other public buildings thereon, *only*."

The act referred to in the foregoing recital of the deed is to be found in the Revised Statutes of Colorado (1868), on page 90, and is composed of five sections; the third section, to which plaintiff in error calls particular attention, and to which the above recital of the deed of plaintiff in error more particularly refers, is as follows:

"SEC. 3. The persons appointed, as aforesaid, in section second of this act" (three commissioners to select the ground for the capitol site) "shall, within sixty days after the date of their appointment, proceed to select a site for the capitol of said Territory, within the said city of Denver, which site shall contain not less than ten acres of land; *and if the site so selected shall be conveyed to the Territory of Colorado by the person, or persons, holding the title thereto, without charge to said Territory*, and so as to vest the title to the same, absolutely and in fee simple, in said Territory, *the site so selected shall be, and remain, the property of said Territory, for the purpose of erecting a capitol and other public buildings thereon.*"

Mr. Justice Barbour, in delivering the opinion in Bradley vs. The W. A. & G. S. P. Co., in 13 Pet., 97, says:

"It is a principle recognized and acted upon by all courts of justice, as a cardinal rule in the construction of *all contracts*, that the *intention* of the parties is to be in-

quired into, and, if not forbidden by law, is to be effectuated."

One of the principal rules of getting at the intention of the parties to a contract is thus stated by Mr. Broom in his "Legal Maxims," *673:

"*Verba relata hoc maxime operantur per referentiam ut in eis in esse videntur*"—that is:

"Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them."

In illustrating the application of this rule, Mr. Broom says:

"And a deed of conveyance, made under the authority of an act of Parliament, and in the form prescribed thereby, must be read as if the sections of the act applicable to the subject matter of the grant and its incidents were inserted in it."

In Noonan vs. Lee, 2 Black, 504, Mr. Justice Swayne, in applying the same rule to the construction of the description of property conveyed by a deed, which, to designate the lots, referred to a certain plat, says:

"Where a map or plat is thus referred to, the effect is the same as if it were copied into the deed."

The deed of the plaintiff in error, by the recital above set forth, must then, in order to ascertain the intention of the parties to this contract, be considered as making such provisions of the "Act to locate the seat of government of the Territory of Colorado," as relate to the land conveyed, and its use, a part and parcel of the said conveyance of the plaintiff in error, and especially that part above quoted, namely, section three thereof, a part of whose language the latter part of the recital is almost a literal copy.

The Territory of Colorado was admitted into the Union on August 1st, A. D. 1876, in accordance with "An Act to enable the people of Colorado to form a Constitution and State government, and for the admission of the said State into the Union on an equal footing with the original States," passed by the Senate and House of Representatives of the United States, and approved March 3, A. D. 1875.

A portion of section four of which act is as follows:

* * "Whereupon the said convention shall be, and is hereby authorized, to form a Constitution and State government for said Territory; *provided*, that the Constitution shall be republican in form, and make no distinction in civil or political rights on account of race or color, except Indians not taxed, *and not be repugnant to the Constitution of the United States* and the principles of the Declaration of Independence."

The "SCHEDULE" of the Constitution of the State of Colorado, adopted under the provisions of the foregoing act of Congress, provides as follows:

"That no inconvenience may arise by reason of the change in the form of government, it is hereby ordained and declared:

"SECTION 1. That all laws in force at the adoption of this Constitution shall, so far as not inconsistent therewith, remain of the same force as if this Constitution had not been adopted, until they expire by their own limitation, or are altered or repealed by the General Assembly; and *all rights*, actions, prosecutions, claims and *contracts* of the Territory of Colorado, counties, individuals, or bodies corporate, (not inconsistent therewith,) shall continue as if the form of government had not been changed and this Constitution adopted.

* * * * * *

"SEC. 3. That all property, *real* and personal * * belonging to the Territory of Colorado, at the adoption of this Constitution, shall be vested in and become the property of the State of Colorado."

It is by virtue of this last section that the defendant in error, the State of Colorado, claims the title to the realty, which is the subject of this controversy.

The Constitution of defendant in error in Article VIII, entitled "STATE INSTITUTIONS," provides *inter alia*, as follows:

"SEC. 2. The General Assembly shall have no power to change or to locate the seat of government of the State, but shall at its first session subsequent to the year of our Lord one thousand eight hundred and eighty, provide by law for submitting the question of the permanent location of the seat of government to the qualified electors of the State, at the general election then next ensuing, and a majority of all the votes upon said question cast at said election shall be necessary to determine the location thereof. Said General Assembly shall also provide that in case there shall be no choice of location at said election, the question of choice between the two places for which the highest number of votes shall have been cast shall be submitted in like manner to the qualified electors of the State, at the next general election; *provided*, that until the seat of government shall have been permanently located as herein provided, the *temporary* location thereof shall remain at the City of Denver."

Section 3 states the manner in which the location of the capitol may thereafter be changed.

"SEC. 4. The General Assembly shall make *no appropriation or expenditure for* CAPITOL BUILDINGS OR GROUNDS, until the seat of government shall have been permanently located, as herein provided."

This being the state of affairs on the 9th day of May, A. D. 1879, the Territory of Colorado not having commenced to build any capitol or other public buildings of any kind on the land in controversy, or taken possession or exercised acts of ownership over the same or any part thereof, the plaintiff in error on that day entered upon and took possession of said land, and also executed and recorded with the recorder of deeds of the proper county, a declaration in writing which recites the fact of the foregoing conveyance to the Territory of Colorado, a description of the land in controversy, the recital of the first deed hereinbefore set forth on page 2, and then concludes as follows:

"And, whereas, neither the said Territory nor its successor, the State of Colorado, have ever accepted the said conveyance, located and erected a capitol and other public buildings on said tract of land as in and by said deed provided," (meaning the deed of plaintiff in error to the Territory of Colorado, referred to heretofore on page 1);

"Now, therefore, in consideration of the premises and of other good and sufficient causes, I, the said Henry C. Brown, have and hereby do revoke, annul and declare and make void and of no effect the aforesaid conveyance, and all right, title and interest therein granted to the said then Territory of Colorado, its successors and assigns."

Under these circumstances, the defendant in error, the State of Colorado, on or about the 9th day of May, 1879, brought an action in the nature of ejectment against the plaintiff in error herein, Henry C. Brown, alleging seisin in fee of the land in controversy on the 11th day of January, A. D. 1879. The plaintiff in error herein answered, denying the ownership, seisin, and possession of the State of Colorado, at any and all times, to said land, or any part thereof.

The cause was three times tried in the *nisi prius* Courts, and then appealed to the State Supreme Court, where the judgment of the Court below, in favor of the State of Colorado and against the plaintiff in error, was affirmed; and plaintiff in error sued out his writ of error from this tribunal to the State Supreme Court, under Sec. 709 of the Revised Statutes of the United States.

The particular portions of the section on which plaintiff in error relies, are as follows:

"A final judgment or decree in any suit in the highest Court of a State, in which a decision in the suit could be had, * * * 1st, Where is drawn in question the validity of a statute of * * any State, on the ground of * being repugnant to the Constitution * or laws of the United States, and the decision is in favor of their validity.

2d, Where any title, right, privilege or immunity is claimed under the Constitution, or any * * statute of, * * or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such Constitution, * * statute, * * or authority, may be re-examined," etc.

There have been many decisions made by this tribunal upon the question of jurisdiction, and as a result, occasionally the decisions have been collected and reviewed, and a statement made showing what was requisite to allow jurisdiction therein to be exercised by this Court.

Among these cases the defendant in error cites at length from the cases of Crowell vs. Randell, 10 Pet., 368, Armstrong vs. Peters, 16 Pet., 281, and Gibson vs. Chouteau, 8 Wallace, 314, as laying down the correct rule as to what constitutes the record and what must appear in it, expressly or by necessary intendment, to show the raising

of what is termed in some of the opinions, a federal question, of which this Court can have jurisdiction.

It seems to the plaintiff in error that the cases above referred to are not now the leading cases on the question of jurisdiction, and what the Court may refer to determine if a so-called federal question was involved.

All the above decisions, with the possible exception of the last named case in 8 Wall., were made upon the law as originally passed by Congress in the year 1789. In the year 1867 Congress revised the law and made some radical changes therein, the effects of which were the subject of elaborate arguments by able counsel on several occasions, and finally resulted in the elaborate decision of this Court by Mr. Justice Miller, in the case of Murdock vs. Memphis, 20 Wallace, 590, wherein, on page 635 of the opinion, the rule is thus stated:

"Finally, we hold the following propositions on this subject as flowing from the statute as it now stands:

"1. That it is essential to the jurisdiction of this Court over the judgment of a State Court, that it shall appear that one of the questions mentioned in the act must have been raised and presented to the State Court.

"2. That it must have been decided by the State Court, or that its decision was necessary to the judgment or decree rendered in the case.

"3. That the decision must have been against the right claimed or asserted by plaintiff in error under the constitution, treaties, laws or authority of the United States.

"4. These things appearing, this Court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the State Court."

Upon comparing this decision with that of this Court in the case of Crowell vs. Randell, 10 Pet., 368, relied on by counsel for defendant in error, which was made under the act of 1789, it will be seen that the requirement, "4. It is not sufficient that a question might have arisen or been applicable; it must appear it did arise and was applied"—is entirely done away with by the construction of this Court of the act of 1867.

And on the question of what the record must show, and whether the opinion of the Court below may be examined, it is said on page 633 of the opinion of the Court that—

"The omitted clause of the act of 1789 declared that no other error should be regarded as a ground of reversal than such as appears *on the face of the record* and immediately respects the before mentioned questions."

"It is probable that in determining whether one of these questions was actually raised and decided in the State Court, this Court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' What was the record of a case was pretty well understood as a common law phrase at the time that statute was enacted. But the statutes of the States and new modes of proceedings in those Courts have changed and confused the matter very much since that time. It is in reference to one of the necessities thus brought about that this Court long since determined to consider as part of the record the opinions delivered in such cases by the Supreme Court of Louisiana. And though we have repeatedly decided that the opinions of other State Courts cannot be looked into to see what was decided, we see no reason why, since the restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question."

The law, as laid down by this case, has been followed by all the subsequent decisions rendered by this Court, touching the question of jurisdiction, since its delivery, and its requirements must therefore be the test of the question of jurisdiction in this case.

As the application of a rule of law is always made more clear and explicit by illustration, let us examine some of the applications of the requirements laid down in the foregoing opinion:

In Murdock vs. City of Memphis, 20 Wallace, 590, 636, the case above referred to, wherein the principles of jurisdiction are laid down, the facts are thus stated in the opinion of the Court:

"The suit was a bill in chancery brought by Murdock and others against the city of Memphis to have a decree establishing their right in certain real estate near that city. The United States having determined to build a navy yard at Memphis, about the year 1844, or previous thereto, the city of Memphis, on the 14th day of September in that year, conveyed to the United States the land in controversy by an ordinary deed of general warranty, expressing on its face the consideration of $20,000 paid and designating no purpose for which the land was conveyed. After retaining possession of the land for about ten years without building a navy yard, the United States abandoned that purpose, and by an act approved August 5, 1854, ceded the property to the city of Memphis by its corporate name for the use and benefit of said city.

"The plaintiffs in error, by their bill, allege that the title was originally conveyed to the city of Memphis, in trust, for certain purposes, including that of having a navy yard built in it by the United States; that when the title reverted to the city, by reason of the abandonment of the place as a navy yard by the United States, and the act

of Congress aforesaid, the city received the title in trust for the original grantors, who are the plaintiffs, or who are represented by plaintiffs. * * * *

"On hearing the bill was dismissed, and this decree was affirmed by the Supreme Court of the State, the complainants, in their bill, and throughout the case, insisted that the effect of the act of 1854 was, to vest the title in the mayor or aldermen of the city in trust for them.

"It may be very true that it is not easy to see anything in the deed by which the United States received the title from the city, or the act by which they ceded it back, which raises such a trust, *but the complainants claimed a right under this act of the United States, which was decided against them by the Supreme Court of Tennessee, and this claim gives jurisdiction of that question to this Court.*"

In the case of Bridge Proprietors vs. Hoboken Co., 1 Wallace, 116, 143, which was a construction of the old act of 1789, Mr. Justice Miller, in delivering the opinion of the Court, commenting on the cases of Crowell vs. Randell, 10 Pet., 368, and Armstrong vs. the Treasurer of Athens County, 16 Pet., 281, says:

"Referring especially to the manner in which the question on which the jurisdiction must rest shall be made to appear, he" (Judge Catron, in Armstrong vs. the Treasurer of Athens County,) "lays down six different modes in which that may be done. The first of these is 'either by express averment or by necessary intendment in the pleadings in the case.' The sixth is, 'that it must appear from the record that the question was necessarily involved in the decision, and that the State Court could not have given the judgment or decree which they passed without deciding it.'

"Now, although there are other decisions in which it is said that the point raised must appear in the record, and

that the particular act of Congress, or part of the Constitution supposed to be infringed by the State law, ought to be pointed out, *it has never been held that this should be done in express words.*

"But the true and rational rule is, that the Court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.

"Looking at the record before us, and applying to it these principles, we find no difficulty in the matter. The defendants claim, under the act of 1860 of the New Jersey Legislature, a right to build their railroad bridge, or viaduct, over the Hackensack river, inside the limits prohibited by the act of 1790. The plaintiffs say, that to permit this, is to violate the contract which they have with the State of New Jersey; and therefore the act of 1860, so far as it confers such authority on the defendants, is made void by the Constitution of the United States, because it impairs the obligation of a contract. The State Court dismissed the bill on these pleadings alone. It could not have done this without holding the act of 1860 to be valid, as it was the only authority on which defendants rested their right to build any structure whatever over the Hackensack river. In holding that act to be valid, notwithstanding plaintiffs' claim that it was void, as impairing the obligation of their contract with the State of New Jersey, a decision was made within the terms of the twenty-fifth section of the act of Congress of 1789."

And, in the first part of the same opinion, in this same case, it is said:

"It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void

because it conflicts with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the act invalid."

(This is just what the defendant in error in this case contends, citing in support thereof M. C. R. R. Co. vs. M. S. R. R. Co., 19 Howard, 378, and Lawler vs. Walker, 14 *id.*, 149.)

"It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provisions of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this Court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant, in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this Court surely can recognize the fact without requiring the pleader to say in words: 'This paragraph of the Constitution is the one involved in this case.'"

In Furman vs. Nichol, 8 Wallace, 44, which was a case in error to the Supreme Court of Tennessee, and was decided under the act of 1789, the record showed that the State Bank of Tennessee was created in 1838, by the State, *with a provision in its charter, that, inter alia, its bills or notes should be received in all payments for State taxes;* by reason of the rebellion and the fraudulent issue of a great number of its bills or notes at about that time, the people of the State, when they re-organized the State government in 1865, declared in their amended Constitution that all notes of the bank issued on or after May 6, 1861, were null and void, *and in the following June the Legislature re-*

pealed by express terms the provision of the bank's charter of 1838, *which allowed the payment of State taxes to be made by means of the bank's bills and notes.* Furman, the plaintiff in error, who was carrying on a mercantile business, which was licensed by the State, contemplated taking in a partner, and under the law it being necessary for him to account for the business already done by him under his license, and give a new bond to carry on the firm business, he went to the clerk of his county and on August 3, 1866, *tendered to him in payment of his State taxes the proper amount in the notes of the Bank of Tennessee, issued prior to the 6th of May,* 1861, and a bond in full compliance with the law.

The clerk refused to receive the notes and comply with his request.

He and his partner thereupon applied to the State Circuit Court for a mandamus to compel the clerk to receive their bank notes, stating the facts as above detailed.

The county clerk demurred, which was overruled and the mandamus was awarded by the Circuit Court, but on appeal the State Supreme Court reversed that decision and the cause was taken up by writ of error to this Court. Mr. Justice Davis, in delivering the opinion of the Court in the part touching the question of jurisdiction, says:

"It is enough for the purposes of this suit to say, that a cause can be removed from a State Court into this Court under the 25th section of the Judiciary Act of 1789, whenever some one of the questions embraced in it was relied on by the party who brings the cause here, and when the right it gave him was denied to him by the State Court. It was urged that the particular provision of the Constitution, which the plaintiffs in error say has been violated in its application to their case, should be contained in the pleadings, but this is in no case necessary. If the record shows, either by express averment or

by clear and necessary intendment, that the Constitutional provision did arise, and that the court below could not have reached the conclusion and judgment it did reach without applying it to the case in hand, then the jurisdiction of this court attaches. And it need not appear that the State Court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiffs in error, and that the Court was induced by it to make the judgment which it did. Testing the case at bar by these rules, it is apparent that it is properly here."

* * * * *

"The application for the writ proceeded on the theory that the State had, in the passage of the act creating the Bank of Tennessee in 1838, made a contract with its people to receive these notes in payment of State taxes, and that it was not in the power of a subsequent Legislature to impair the binding force of this contract. The proceeding was an effort on the part of the plaintiffs in error to test the question of the validity of the authority of a public officer of the State, on the ground that such authority was repugnant to that provision of the Federal Constitution which forbids a State to pass any law impairing the obligation of a contract.

"The purpose of the petition, the issue which it presented and sought to have determined, were as plainly to be seen as if the words of the particular constitutional provision relied on had been inserted in it, and the obnoxious legislation spread out at length. All courts take notice without pleading, of the Constitution of the United States, and the public laws of the State, where they are exercising their functions.

"It is insisted that the petition should have averred that the State had impaired, or by some act attempted to im-

pair the obligation of a contract, but this does sufficiently appear by necessary intendment, for it is alleged that Furman was the owner of the notes and entitled to have them received for taxes, by virtue of a contract with the State; that he had tendered them to the defendant, who refused to receive them, and that it was not in the power of the Legislature to impair the validity of this contract."

To the same effect are the decisions of this Court in the cases of—

University vs. People, 99 U. S., 309; and
Murray vs. Charleston, 96 U. S., 432.

In the last case, which was an action against the city of Charleston to recover the interest money, due and owing to Murray, who was a non-resident of the State of South Carolina, and a holder of some of its city stock, which interest money was being retained to pay an assessment on the stock under a city ordinance passed subsequent to the act issuing the stock, Mr. Justice Strong, in delivering the opinion of the Court, said:

"The city ordinances were in question on the ground of their repugnancy to the inhibition upon the States to make any law impairing the obligation of contracts; and the decision was in favor of their validity. Nothing else was presented for decision, unless it be the question whether the acts of the State Legislature authorized the ordinances; and that was ruled affirmatively. The jurisdiction of this Court over the judgments of the highest courts of the States is not to be avoided by the mere absence of express reference to some provision of the Federal Constitution, wherever rights acknowledged and protected by that instrument are denied or invaded under the shield of State legislation, this Court is authorized to interfere. The form and mode in which the Federal

question is raised in the State Court is of minor importance, if, in fact, it was raised and decided. The Act of Congress of 1867 gives jurisdiction to this Court over final judgments in the highest courts of a State in suits," etc., (reciting the act.) "Not a word is said respecting the mode in which it shall be made to appear that such a question was presented for decision. In the present case it was necessarily involved without any formal reference to any clause in the Constitution, and it is difficult to see how any such reference could have been made to appear expressly. In questions relating to our jurisdiction, undue importance is often attributed to the inquiry whether the pleadings in the State Court expressly assert a right under the Federal Constitution. The true test is not whether the record exhibits an express statement that a federal question was presented, but whether such a question was decided, and decided advisely to the Federal right. Everywhere in our decisions it has been held that we may review the judgments of a State Court when the determination or judgment of that Court could not have been given without deciding upon a right or authority claimed to exist under the Constitution, laws, or treaties of the United States, and deciding against that right. Very little importance has been attached to the inquiry whether the Federal question was formally raised."

In Pennywit vs. Eaton, 15 Wallace, 380, this "Court refused to dismiss for want of jurisdiction a case brought here as within the 25th section of the Judiciary act, when they could see a Federal question raised under it, though raised somewhat obscurely."

In the light of all these decisions let the record be examined.

This was an action of ejectment. The plaintiff must recover on the strength of his own title.

Watts vs. Lindsey's Heirs, 7 Wheaton, 161.
Gilmore vs. Pointdexter, 10 Howard, 467.

And he must show—

1. That he had the legal title to the premises in himself at the time of the demise laid in the declaration.

Fenn vs. Holme, 21 Howard, 483.

2. That he also had the right of possession.

Cincinnati vs. The Lessee of White, 6 Pet., 441.

The plaintiff below, defendant in error here, offered in evidence the deed of the defendant below, to the Territory of Colorado, which was objected to for a number of reasons, among others, that the Territory of Colorado had no right to take a conveyance for real estate at the time of the making of the deed (January 11, 1868), without the consent of the Government of the United States.

In stating the political status of a Territory, Mr. Chief Justice Waite, in National Bank vs. County of Yankton, 101 U. S., 133, says:

"All territory within the jurisdiction of the United States not included in any State must necessarily be governed by or under the authority of Congress.

"The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organizations. The organic law of a Territory takes the place of a Constitution as the fundamental law of the local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and for the purposes of this department of its governmental authority has all the powers of the people of the United States.

except such as have been expressly or by implication reserved in the prohibitions of the Constitution."

Clearly, then, a Territory can have no greater powers than the United States. The following statutes of the United States were in force at the time of the making of the deed which was offered in evidence (the citations are from Rev. Stats., 2d Ed.):

"SEC. 3732. No contract or purchase on behalf of the United States shall be made unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, etc."

"SEC. 3736. No land shall be purchased on account of the United States, except under a law authorizing such purchase."

And the following statutes were passed by Congress shortly after the passage of the Territorial act locating the seat of government at Denver and the making of the deed of plaintiff in error to the Territory of Colorado thereunder:

"SEC. 3733. No contract shall be entered into for the erection, repair or furnishing of any public building, or for any public improvement which shall bind the government to pay a larger sum of money than the amount in the treasury appropriated for the specific purpose.

"SEC. 3734. Before any new buildings for the use of the United States are commenced, the plans and full estimates therefor shall be prepared and approved by the Secretary of the Treasury, the Postmaster General and the Secretary of the Interior, and the cost of each building shall not exceed the amount of such estimate."

Section 1891 provides that all laws of the United States not locally inapplicable shall have the same force and effect in the Territories as elsewhere in the United States.

This is the first title, right, privilege or immunity claimed under a statute of the United States by plaintiff in error, in which the decision was against the right claimed by him; for the objection was overruled and the deed admitted in evidence by the *nisi prius* Court, and the Supreme Court of Colorado, on appeal, affirmed that judgment. All of which expressly appears by the record.

A further reason urged against the admission of this same deed in evidence under the same general objection, was that, under the Organic Act of the Territory of Colorado and the general legislation of Congress designated in the Revised Statutes of the United States as "Title XXIII.—The Territories—Ch. 1," and such portions of "Chapter 2" as had special reference to the Territory of Colorado, the most important of which are hereafter cited, clearly showed the intention of Congress under their acts, was that the form of government therein provided for was only temporary and provisional, and that Congress did not mean that any Territory should have the right to permanently locate its seat of government, and purchase lands and build buildings therefor, without a special act to that end.

The last part of section one of the Organic Act of the Territory of Colorado is as follows:

"*Provided, further*, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing said Territory into two or more Territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion thereof to any other Territory or State."

The following provisions are from the Revised Statutes of the United States, under "Title XXIII.—Territories:"

"SEC. 1840. Nor shall anything in this Title be con-

strued to affect the authority of the United States to make any regulations respecting the Indians of any Territory, etc., in the same manner as might be made if *no temporary government existed*, or is hereafter established, in any such Territory."

"SEC. 1847. Previous to the first election for members of the legislative assembly of a Territory in which Congress may hereafter provide a *temporary government*, the governor shall, etc."

"SEC. 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," * *

"SEC. 1863. The first election of a Delegate in any Territory for which a *temporary government* is hereafter provided by Congress, shall be held, etc."

"SEC. 1885. The legislative assembly of every Territory hereafter organized shall hold its first session at such time and place in the Territory as the governor thereof shall appoint and direct; and at the first session of the legislative assembly, or as soon thereafter as it may be deemed expedient, the governor and legislative assembly shall proceed to locate and establish the seat of government for the Territory at such place as they may think proper; but such place shall thereafter be subject to be changed by the governor and legislative assembly."

"SEC. 1886. All accounts for disbursements, in the Territories of the United States, of money appropriated by Congress for the support of government therein, shall be settled and adjusted at the Treasury Department; and no act, resolution or order of the legislature of any Territory directing the expenditure of the sum shall be deemed a sufficient authority for such disbursement, but sufficient vouchers and proof for the same shall be required by the accounting officers of the Treasury. No

payment shall be made or allowed unless the Secretary of the Treasury has estimated therefor, and the object been approved by Congress. No session of the legislature of a Territory shall be held until the appropriation for its expenses has been made."

"SEC. 1888. No legislative assembly of a Territory shall, in any instance, or under any pretext, exceed the amount appropriated by Congress for its annual expenses."

"SEC. 1891. The Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized as elsewhere within the United States."

"SEC. 1899. All that part of the territory of the United States included within the following limits, viz.: * * * * * * is erected into *a temporary government* by the name of the Territory of Colorado."

"SEC. 1944. The seat of government of the Territories of * * * * * Colorado * * may be *changed* by the Governors and Legislative Assemblies thereof respectively."

This is the second title, right, privilege or immunity claimed by plaintiff in error under statutes of the United States, "and the decision was against the title, right, privilege or immunity claimed" by him.

All which is expressly shown by the record of this case.

In his defense in this case below, the plaintiff in error claimed, that his deed, and the statute referred to in it, above set out on pages 1 and 2, constituted a contract in regard to the use of the land in controversy; and on the general principle that a grantor can take no better title than his grantee had, and, consequently, must take it with the burden, that, by section three of the "Schedule" cited

above, on page 5, whereby the defendant in error took all the realty of the Territory of Colorado, it took nothing more than its title; but, as by section two of Article VIII of its Constitution, the capitol could not be located anywhere until after A. D. 1880, and, by section four of the same article, it could make "*no appropriation or expenditure for* CAPITOL BUILDINGS OR GROUNDS" until the settlement of the location of the capitol after A. D. 1880; that the contract in regard to the land was broken, and the land reverted to him. This appears on the record in the opinion of the Supreme Court, where they treat of the question as a condition subsequent.

This was the third "right, title, privilege or immunity claimed" by the plaintiff in error under Article 1, Section 10, of the Constitution of the United States, which provides: "No State shall pass any * * law impairing the obligation of contracts," wherein "the decision was against the title, right, privilege or immunity claimed" thereunder.

It was also urged by plaintiff in error, that since the State Constitution was an entire instrument, and must be so construed; and as section one of its "Schedule" (cited *ante* p. 4,) adopted all the legislation of the Territory of Colorado in force at the adoption of the State Constitution, so far as not inconsistent therewith, that the Territorial statute locating the seat of government at Denver, and under which the deed of plaintiff in error was made, was repealed by implication by Article VIII, sections 2 and 4, of the State Constitution, and that being so, the land would revert to him, but for the section three of the "Schedule," (cited *ante* p. 5,) which vested all the realty of the Territory of Colorado in the State of Colorado, and that, therefore, the effect of said section three of the "Schedule" was to deprive him of his property, without due process of law, and was also a taking of his private property for

public use, without just compensation, within the meaning of section 1, Article V, of The Amendments to the Constitution of the United States, and also within the meaning of the prohibition of section 1, Article XIV, of The Amendments to the Constitution of the United States, which provides: "Nor shall any State deprive any person of * * property without due process of law."

We are aware that Article V of the Amendments above cited is held to apply to Federal action only; but this Constitution of the State of Colorado was, by section four of the Enabling Act (cited *ante* p. 4), under which Colorado was admitted to the Union, expressly required, *inter alia*, "*not to be repugnant to the Constitution of the United States.*"

Consequently, plaintiff in error contends, that here clearly were several rights claimed by him under different provisions of the Constitution of the United States and the Enabling Act of Congress, under which Colorado was admitted to the Union, and the decision was against the rights so claimed.

Furthermore, on all these last questions, the validity of the highest possible statute of any State, its Constitution, was drawn in question, on the ground of its being repugnant to the Constitution of the United States and the act of Congress under which Colorado was admitted to the Union, popularly called the Enabling Act, and the decision was in favor of the validity of the State Constitution; and these things, appear by the record, were urged by plaintiff in error, and the decision given by the Supreme Court could not have been given without deciding them against him.

All these things must appear, by the record, by the clearest kind of intendment, if they do not expressly appear, and any one of them would have been a complete

protection to defendant against the plaintiff in this action, and the Courts could not have decided this case for the defendant in error without deciding against these Federal Constitutional and statutory rights claimed by this plaintiff in error.

For these reasons, plaintiff in error thinks this case is clearly within the jurisdiction of this tribunal.

CHARLES CASE,
JAMES H. BROWN,
Attorneys for Plaintiff in Error.

OFFICE SUPREME COURT U.S.
FILED
OCT 30 1882
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1882.

No. 612

HENRY C. BROWN, Plaintiff in Error,

vs.

THE STATE OF COLORADO.

Error to the Supreme Court of the State of Colorado.

MOTION TO ADVANCE, &c.

Brief in Opposition to said Motion, by

JAMES H. BROWN and
CHARLES CASE,
Of Counsel for Plaintiff in Error.

Thomas McGill & Co., Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

October Term, 1882.

HENRY C. BROWN, Plaintiff in Error,

vs.

THE STATE OF COLORADO.

No. 612.

Error to the Supreme Court of State of Colorado.

Motion by Defendant in Error to Advance the Cause.

Brief in Opposition to said Motion.

At the threshold of the few suggestions now to be submitted, let it be frankly avowed that when, and for some time after, the writer was retained as counsel in this cause, having but general ideas of the questions intended to be raised upon the record, he was far from confident as to final success. On the contrary, there were grave doubts, painful misgivings in regard to the views and theory of the case held by plaintiff in error, and these doubts and fears only yielded, and, at last wholly subsided, after the most

critical consideration of the law and facts, which the brief time at command would permit.

This confession is here put forward because, in this august presence, surely it can work no prejudice; and especially because, upon the very source and origin of these apprehensions may be based an argument of considerable weight against any hasty disposition of this case.

From some of its special characteristics the case is one worthy of careful, patient study, deliberate consideration, or it is worth no attention at all. Some of the important points which, upon final hearing, counsel for plaintiff in error will endeavor to sustain by argument and commend to the favorable judgment of the court, are not, at first view, so palpable, do not stand forth in such bold outline on the face of the record as do many, perhaps the majority of propositions submitted to this court for adjudication. If counsel for plaintiff in error do not seriously misapprehend these questions, they are correctly characterized as being well grounded in the record, and yet requiring, for the demonstration of this fact, as well as for such elimination and application of them as will establish their pertinence, force, and conclusiveness, more than ordinarily careful study, more than usual critical analysis. By this is not meant lengthly argumentation, but rather an argument that may be as brief as it should be terse and incisive, and such as can be submitted only as the result of slow, thorough, perhaps exhaustive examination and reflection.

It must remain for discussion upon the pending motion to dismiss, and finally upon the merits, to further show justification for these remarks. Suffice it now to add, that if it was apparent, beyond reasonable question, that some great public necessity, some threatened public peril were clamoring against the ordinary delays of the law, then might there be propriety in shortening the usual time per-

missible for the due presentation of even cases free from special intricacies or obscurities; but while it doth not clearly appear that special harm can come to the State by pursuing the beaten path, why depart from it in face of the protest of the citizen party, who avers that haste may make waste of his valued rights?

Changing the line of argument, it is respectfully submitted, and that, too, with all due respect to our youngest sister State, that she has hardly made the record in this matter which, as against plaintiff in error, should entitle her to special favors. Her anxiety for haste, for immediate, definite settlement of her rights in this contention, is a spasm of recent date, and in marked contrast with her dilatory treatment of plaintiff in error at an earlier period. The land in dispute, intended to be conveyed as the site for the State capitol building, was, as a matter of fact, (and presumably so from the face of the record, as will be shown at the proper time,) a donation, the consideration or motive cause for which, on the part of the grantor, was, past all dispute, the immediate, or at least early and certain, not the doubtful and distant, benefit he would derive from enhancement in value of his remaining, adjacent realty. The State, through her officials, could not have been ignorant of this purpose and expectation of plaintiff in error. His deed was executed in January, 1868, (R., p. 19) more than fourteen years ago. True, Colorado was then a Territory, and he knew that, for the time being, he must be content with the conditional acceptance and temporary use of the land, for the sole purpose named in the grant, incident to such territorial condition; but, by a fair interpretation of his deed, as we now assert, and upon the merits, shall endeavor to demonstrate he had a right to expect, and *to insist*, that as soon as the Territory put on garments of womanhood, became a sovereign State, she would promptly accept, and within reasonable time use, the site

so conveyed; or, failing to do this, surrender all claim to the premises.

Well, what are the facts? Neither the Territory nor the State, up to the date of the trial of this case in the *nisi prius* court, had done one act asserting ownership, or implying an attempt to use the premises for a capitol and other State buildings. That this statement exactly accords with the proof, see the undisputed testimony of Brown, Rec., p. 20. What more? Colorado became a State, under her present Constitution, August 1, 1876. By that organic law she virtually and most emphatically said to plaintiff in error: "Sir, do not for a moment dream that the site donated by your grant has been accepted as a permanent location for the capitol or any other State building. We, the sovereign people of the State, hereby give you to understand that, so far from accepting it, we do not for the present decide that Denver shall be the permanent capital of the State. As to that, we propose to make haste very slowly. We therefore order that, by and by, that is to say, at the first session of the General Assembly after the year 1880, (at least four years hence,) that body shall provide by law for taking the vote of the people at the next general election thereafter, (not sooner than November, 1881,) upon the question of a permanent capital for the State. If, at such election, a majority of the voters say, Denver, Denver it shall be; if they say Golden City, or any other city, there it must go." "Moreover, if at such election there is no majority vote for any one location, the question between the two places having the highest number of votes must be settled by the voters of the State at the next general election thereafter, that is to say, in November, 1882," (not quite a month hence.) "Thus, Mr. Brown, are you duly notified that we, the sovereign people of Colorado, have not as yet accepted your grant as a site for the capitol building, nor is it certain we ever will. If you conveyed,

in anticipation of compensation, through enchanced value to your remaining adjacent lands, you must be content to sit still and chew your thumbs until you hear from the people, not sooner than five years hence! If, meantime, in view of the uncertainty thus created, the tide of improvement sits elsewhere in the city, and you see wealth and culture making tempting homes and charming, permanent improvements in some other portion of the temporary capital, you must pocket the chagrin and disappointment as incident to your over-credulous and confiding nature." "You should not have been so sure of honest treatment at our hands!"

This is not the time for discussing the question whether this action of the young State was not a flagrant violation of the rights of plaintiff in error, as expressly or by legitimate implication reserved by his deed; but it is no overdrawn picture of the manner in which the State, in the past, and until he would endure it no longer, has trifled with and dallied over his gift. After thus postponing and disappointing his hopes and just expectations for a decade of years, does it become the State now to beg for unusual haste?

We do not forget with what well-chosen words the court below proceeded to demonstrate that, in the matter of erecting its capitol-building, it was prudent, if not necessary, for the young State to move slowly. Neither now nor hereafter shall we quarrel with this argument, though, at the proper time, we may venture a hint that it wears an evasive aspect, inasmuch as the real question, if any, was, not within what reasonable time the State should be required to build, but within what reasonable time should she accept the gift of a site upon which to build; and this in view of the consideration moving the grantor to tender the donation. But such discussion is not now pertinent, and the subject is alluded to because something may be here suggested as

to the tardiness to be expected in the movements of a young State.

It remains to complete the picture. We have seen what language the State, through her organic law, virtually held toward plaintiff in error. Let us suppose him as suggesting the following response: "Well, this is hardship and wrong, as unprecedented as it was unanticipated; but, suppose I conclude to submit to it, may I not suggest that, in the way of easing slightly the load imposed, you give me at least the encouragement of temporarily improving and using the site, while the capital temporarily remains at Denver." What response does he get? Again, let the State Constitution furnish the answer: "Not a dollar, not a dime, for either public buildings or grounds until a permanent capital is selected by the vote of the people, as by this constitution prescribed."

With such a record, is it possible we have the spectacle of this same State begging for haste in this high presence?

(For the precise language of the two constitutional provisions above referred to, to wit, sections 2 and 4 of article VIII, see brief for plaintiff in error, on "motion to dismiss," page 5.

Proceeding to notice, with more particularity, the petition filed by the honorable Attorney-General in support of this motion, it is conceded that the subject-matter of the dispute is correctly stated; that the land thus in contention (ten acres) was selected by commissioners for the purpose of erecting thereon a capitol and other public building, and that plaintiff in error conveyed the premises to the State, then Territory, for such purpose *only*. Of course the title of the State and her right to the possession are disputed.

It may or may not be the purpose of the State of Colorado to erect a capitol-building on the land in controversy.

The statement of the Attorney-General to that effect is not legal proof of such a purpose. Nor should such intent be inferred from the legislative act approved February 11, 1881, because the money thereby appropriated was not thus to be used, and because the act was and is a nullity, as will presently appear.

Undoubtedly the information of the Attorney-General is such as to induce him to believe that "the people of Colorado *earnestly desire* the improvement of said premises and the erection of a capitol-building thereon." His information may be correct and sufficient warrant for his belief, but it may also be incorrect and insufficient. Therefore, what he has heard and what he believes in this regard are not proof of the actual sentiment of the people.

So, also, it may be true that the State cannot, while this suit is pending, safely improve said land; but she can now safely appropriate money, and thus be getting ready to build. She was prohibited from appropriating money, either for grounds or buildings, until the seat of government, *not the site for a building*, was permanently located by a vote of the people. (State Constitution, article VIII, section 4, above cited.) Such location having been made, the State can set apart funds for erecting a capitol building when she pleases. It may be prudent for her next General Assembly to do so, *and to add a small sum to pay for grounds.* Considering how slowly such enterprises progress, (see the opinion below,) probably it would be poor economy to then appropriate a sum in excess of what can be legitimately used in preparation, without turning a shovel upon the land, up to the time when this suit is reached and decided in due course.

As to all arguments of the character here considered, it should be borne in mind that the necessity of the State is one thing, her convenience another and very different thing. A private suitor would ask in vain for an advance of his cause, because, quite to his inconvenience, he was obliged

to live in a rented house, whereas upon a determination of the pending suit *in his favor*, he could and would build a house of his own upon the very ground in contention; that he was waiting and anxious thus to invest his money.

As to the act approved February 11, 1881, appropriating $5,000 to improve grounds, &c., we must mention (inasmuch as the Attorney-General did not) the fact that when that act was passed such legislation was explicitly prohibited by the State Constitution, (Art. VIII, sec. 4, *supra*,) and its provisions were therefore null and void. Was its passage a device of oversharp legislators to influence, if possible, the result of this suit then pending in the State court? Perhaps not. Perhaps they held, as we are assured was argued in the court below by the predecessor of the present Attorney-General, that the clause in the deed limiting the use of the land conveyed "for a capitol building, &c., only" was, as against the State, "*ultra vires*" (using his own language) "and void." Hence the premises could be held and used by the State *for raising onions*, if deemed best. At all events, this legislation cannot be taken as indicating an intent to use the land *for the sole purpose named in the grant*. It gives not one dollar for building upon—only for improving the premises.

In passing, attention is invited to a singular feature of this application, to wit: This court is asked to expedite and dispose of this cause in advance of the period given by law to the plaintiff in error within which to initiate "proceedings in error." The judgment brought up for review was rendered April 22, 1881. (R., pp. 26 and 33.) By the law applicable, plaintiff had and has two years from that date within which to prosecute his writ of error. He might have waited until the 22d day of April next, and then filing his transcript, &c., he would have been chargeable with no laches. Suppose he had elected to take this

course. Suppose, on the first day of this term, he had dismissed pending proceedings, and, having done so, suppose he should begin *de novo* next April: Do not these facts and suppositions show that Colorado is praying for unseemly haste?

In the ordinary course of business this case must be disposed of during the next term of this court, within one year doubtless after the time limited for bringing the record up. Ought not this to be satisfactory to our young sister? A lesson inculcating cultivation of patience, that same patience which she endeavored to impose upon plaintiff in error, may just now be as beneficial to the State as can be the early enjoyment of a palatial home.

JAMES H. BROWN,
CHAS. CASE,
Of Counsel for Plaintiff in Error.